# THE CONVEYANCER AND PROPERTY LAWYER

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## HAROLD POTTER

It is with deep regret that the publishers record the death of Harold Potter on July 3, 1951, following an operation. *The Conveyancer and Property Lawyer* in its present form was largely his conception, and he edited the journal section from its beginning. He was peculiarly well suited for this work both by temperament and experience. He started his professional life as a solicitor, and when he changed over to teaching he brought to his work a considerable knowledge of the practice of a solicitor's office. He was later called to the Bar at Gray's Inn and practised as a conveyancer in Lincoln's Inn. In fact, his blend of the academic and the practical was unique. With this went an extraordinary breadth of legal interests—conveyancing and property law, legal history, tort, contract—to all of these he made his distinctive contribution. Probably his most outstanding (and most controversial) contribution to the practice of law was the theory propounded in his article " Caveat Emptor " (Vol. 13, p. 36) and elaborated in *The Journal of Planning Law* that " use " is a matter of title. This strongly held theory, which proceeded from his deep knowledge of the history of our land law, was the subject of much thought on Dr. Potter's part, and of much discussion in this office, before he committed it to print, and he never expected it to gain general acceptance. His main concern was to ensure that the profession was aware of the practical effects of the Planning legislation on conveyancing. This is not the place to discuss this controversy, but it is fair to say that even those who most strongly deny his theory accept many of his practical suggestions. An interesting note on this aspect appears in the *Law Times* (Volume 212, p. 18).

To the publishers his death is a personal loss, and they will greatly miss his kind and wise counsel.

M. W. Maxwell.

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I first met Harold Potter in 1936 prior to the issue of the first number of *The Conveyancer and Property Lawyer* when we were appointed joint editors. From that time up to four days before his death we met constantly, not so much on questions of editorial policy, because each of us carried on our own part of our editorial work without interfering one with the other, but as fellow occupants of my chambers, No. 1, New Square. Generally after one of his numerous conferences he would come and have a yarn with me and so we became firm friends and I found out what a grand person he was. He was always ready to discuss a point, be it law or politics or village life, and his knowledge of law was so profound that oft-times he saved me many hours of delving into authorities which he would quote without any reference to the reports or text books. I think I can say that he disliked intensely the confiscatory trend of the law relating to land and was quick to note the possible results of it.

As co-editor with Dr. Potter I have received many letters expressing their appreciation and regard for him; and one letter especially from Mr. Benas I should like to have printed in full had space permitted in which he says " We shall always remember this kindly friend and cherish the recollection of delightful chats at the meetings of the Society of Public Teachers of Law whose president he was ere long due to be without doubt ".

It will be a long time before we find a professor of law as much versed in the practical side as Harold Potter was. We shall all miss him, especially his fellow workers.

Donald C. L. Cree.

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The greatness of the loss that both academic and practical circles have suffered through the premature death of Harold Potter is some measure of his legal eminence. To the practitioner he was the incarnation of the title of this Journal, of which he was co-editor for so many years. To the undergraduate he offered a wealth of knowledge and a depth of understanding which infected all his students with something of the spirit of English law. His opinions

in practice were never hasty or superficial: to them he brought that wider and deeper view of law which derived from his academic work. Equally his teaching, particularly of the law of property, tort and conveyancing, was infinitely strengthened and illumined by his practical experience, both as a solicitor and at the Bar.

For twenty-one years that were scarred by war and a recurrent sickness which led ultimately to his death, Harold Potter was Dean of the Faculty of Laws in King's College, University of London. Throughout those difficult years he gave himself utterly to strengthening and expanding the academic teaching of law, and particularly of English law and legal history. A generation of lawyers in England and overseas owes him a debt it is as unlikely to forget as he was unlikely ever to forget a single one of them. The future alone can measure the extent of an influence which lives on in English law.

R. H. Graveson.

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It is not easy to realise that Harold Potter has gone. I shall long remember him. He was a man valiant for the law of England, its history and the complex structure which it has become in recent times. Perhaps, as a lawyer, he will be chiefly remembered for two unusual qualities—the extraordinary range of his legal knowledge and his readiness to face and to subdue the really difficult problem and those arid or seemingly intransigent topics which those of us who lack his mental energy are prone to avoid. His record as author and editor bear this out. I remember, when first I met him some twenty-six years ago, an earnest discussion of how best to enlighten students on the problem of vesting. In his later years, however, he was more likely to discuss some subtle problem of conveyancing practice that had come his way, and there was a mellowness which—surprising in one who followed the law with unceasing energy in spite of illness—founded friendship.

As one who has been privileged to be a contributor to *The Conveyancer* under his joint editorship, I cannot conclude this note of appreciation without recalling the kindness and consideration which he showed to me in that capacity. But the abiding memory of his kindliness is linked with admiration of his scholarship. Few men can have excelled him in zeal and industry as masters of the law.

S. J. Bailey.

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As one of the oldest contributors to *The Conveyancer* (New Series) I would like to pay tribute to the memory of Dr. Potter, who has passed away at the early age of fifty-four. He was a tremendous worker, and although for many years he suffered from very indifferent health, he never allowed that fact to delay his work. He was indeed described correctly in a legal journal as indefatigable. His books and editorial activities are too well known to require mention by me. Despite other pressing calls upon his time, he was always most prompt in dealing with any letters which were written to him, and one could be sure that his reply would contain some useful suggestion or comment. Above all, he was never failing in courtesy, and was always willing to consider and discuss patiently any point that was put to him. Like most really busy men, he never made the excuse that he was too busy. *The Conveyancer* owes a very great deal of its success to his efforts, and it will be difficult to replace him.

E. O. WALFORD.

# THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951

By J. Muir Watt, M.A., Barrister-at-Law

*Introductory*

The Leasehold Property (Temporary Provisions) Act, 1951, is a piece of stop-gap legislation, which is intended to hold the position during the preparation of the permanent measures for leasehold reform which the Government has promised within two years from the commencement of the Act (June 24, 1951). The idea is to give the occupying tenants of the premises affected by the Act temporary protection in order that they may be able to benefit from the permanent legislation, whatever form it may take. The Act has, therefore, been described as a standstill measure designed to preserve the *status quo* as far as possible until the permanent solution has been worked out. It has been admitted by the Government lawyers who piloted the Bill for the Act through Parliament that it would be imperfect in many respects if it were intended to be permanent, and they rejected a number of proposed amendments on the ground that, although not unreasonable in themselves, they were inappropriate to a purely temporary arrangement. In studying the Act the reader may find it helpful to bear in mind that its purpose is to provide a kind of moratorium, and that a committee of officials, under the chairmanship of a Cabinet Minister, are already hard at work upon the permanent leasehold legislation which is to follow (*a*).

Although the Act follows upon, and is connected with, the labours of the Leasehold Committee, which sat first under the chairmanship of the late Lord Uthwatt and then of Lord Justice Jenkins, it cannot be regarded as the translation into legislation of either the Majority or the Minority Reports of that Committee. It is, however, essential to a proper understanding of the Act, and it will be even more important for the proper understanding of the future legislation, to study the published Reports of the Committee. The Interim Report, published in June, 1949, dealt only with business premises and was not acted upon by the Government, which preferred to await the Final Report. The Final Report revealed a fundamental division of opinion, with roots going deep into political

(*a*) H. of C. Official Report, December 6, 1950, c. 373–374.

philosophy, in regard to the merits, indeed the ethics, of the leasehold system. Presumably the choice between these divergent views will be made in the permanent legislation. The present Act does not prejudge this issue. For example, in the Final Report the majority pronounce against leasehold enfranchisement, but the minority recommend that it should be offered to occupying ground lessees. It must have surprised some readers to find that leasehold enfranchisement is still a live issue. It has about it a somewhat musty Victorian odour, recalling old-fashioned controversies which now seem half unreal. Yet this particular demand, which dates from the Victorian era in an active political form, has shown itself surprisingly persistent and today has some influential support, *e.g.*, from the T.U.C. It is not quite clear whether its supporters realise that it runs counter to the use which it is proposed to make of the leasehold system in such new social experiments as the New Towns legislation.

Before considering the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, it will be useful to glance briefly at the main gaps in the present system of protection for tenants and at the recommendations of the Leasehold Committee.

It is, of course, obvious that the tenants of dwelling-houses which are outside the rateable value limits of the Rent Restrictions Acts have no protection as regards rent or security of tenure beyond that which their leases or tenancy agreements confer. Further, even if a dwelling-house is within these rateable value limits, a *tenancy* of that dwelling-house may be unprotected if it is a tenancy at a rent which is less than two-thirds of the rateable value of the dwelling-house: section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. A ground rent would normally be less than two-thirds of the rateable value, and, therefore, most tenancies at a ground rent of premises within the limits of the Rent Restrictions Acts are unprotected. The occupying ground lessee of such premises has no remedy under these Acts against eviction at the end of the ground lease. Since the decision of the Court of Appeal in *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, [1950] 2 K. B. 228, it has become evident that the sub-tenant of such a ground lessee has no greater protection than the ground lessee himself, when the latter's ground lease comes to an end, even if the sub-tenant is holding at a rack rent and enjoys full protection under the Rent Acts against the ground lessee so long as the ground lease lasts. The *ratio decidendi* of the *Knightsbridge Case* was that, as a result of section 12 (7), the superior tenancy (the ground lease) had to be treated as if it did not exist and never had existed, as far

as the Rent Acts were concerned. Consequently, the sub-tenant could not claim to benefit from the provisions of the Acts for the protection of lawful sub-tenants, since such protection arises out of the " determination " of the superior tenancy, and it is obvious that that which does not exist can never come to an end. There is still a possibility that this decision, neatly logical as it is, may be challenged in the House of Lords: see *Public Trustee* v. *Dierkin*, [1951] W. N. 290.

The defective state of the system of protection for business tenants provided by the Landlord and Tenant Act, 1927, is generally admitted. The difficulty of proving the existence of " adherent goodwill " within the meaning of the Act has substantially reduced its value to shop tenants and other classes of business tenants which it was intended to benefit.

The majority of the Leasehold Committee in their Final Report rejected the idea of leasehold enfranchisement but considered that the occupying ground lessees of dwelling-houses within the rateable value limits of the Rent Restrictions Acts should be given the protection of which they are at present deprived as a result of section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. They did not propose that any protection should be given to the occupying ground lessees of houses outside the Rent Acts limits. They considered that the protection which they recommended should only be given where the tenant, or someone through whom he claimed otherwise than by purchase, had been in occupation of the premises for a qualifying period of at least three years. They proposed that the rent at which the tenant should be allowed to continue should be determined by the county court, and that the terms of the tenancy should also be adjusted by that court. In fixing the controlled rent, the court would have to take into account, and if necessary to modify, the tenant's obligations, especially in regard to repairs. The Committee suggest that complete discharge of outstanding claims under the repairing covenants in the original leases should not be required, but that responsibility for putting and keeping the premises in good and tenantable repair should be placed on the tenant as a condition of enjoying the benefit of the statutory tenancy, the controlled rent being fixed accordingly. The majority of the Leasehold Committee also recommended that the protection of the Rent Acts should be extended to the sub-tenants of ground lessees of houses within the rateable value limits of the Rent Acts, in order to reverse the effect of the *Knightsbridge* decision. A Minority Report recommended leasehold enfranchisement for occupying ground lessees. A supplementary report, signed

by the minority and by three of the majority, recommended security of tenure at a fair market rental for residential tenants generally. They regarded it as unreasonable that the tenants of houses outside the limits of the Rent Acts should be unprotected. Mr. Selwyn Lloyd signed a one-man minority report on business premises, which is rather interesting because it recommended giving interim protection to business tenants on the lines of the temporary protection given to shop tenants by Part II of the present Act. It is also an interesting commentary upon the cross-currents of opinion on this complex subject that the successor of Lord Uthwatt as Chairman of the Leasehold Committee, Lord Justice Jenkins, appended a note to the Majority Report which contains the most searching criticism which has been published of the conclusions of the Interim Report signed by his predecessor.

### *Part I of the Act: Residential Property*

#### Nature of Property and Interest Protected

Part I of the Act gives temporary protection to the occupiers of dwelling-houses comprised in properties which have been the subject of certain long leases. These long leases are leases which were originally granted for terms certain exceeding twenty-one years. The nature of the protection given is, broadly speaking, to safeguard the occupation of lessees under such leases for a period of two years from the commencement of the Act (June 24, 1951) notwithstanding the fact that the leases would normally terminate by effluxion of time within that period. As will be seen later, protection is also extended to certain cases where leases of this kind have *already* expired before the commencement of the Act, but this will be explained in greater detail subsequently.

Section 1 deals with the ordinary type of case where the tenancy is in existence when the Act commences but would come to an end, apart from the Act, within the two-year period, *i.e.*, before midnight on June 23, 1953. Section 1 provides that if immediately before the normal date of expiry of the tenancy the tenant or a member of his family is residing in a dwelling-house comprised in the property in right of the tenancy, then, subject to the provisions of the Act, the tenancy will not expire but will continue until the end of the two-year period upon the same terms and conditions as before.

Part I is intended to protect the occupiers of residential property, *i.e.*, dwelling-houses. It is, therefore, an essential condition of the protection given by this Part that the tenancy should include a dwelling-house. It may, however, also include other dwelling-

houses, and it may also include non-residential premises. Thus a block of flats may fall within Part I and mixed residential and business premises may fall within it. It is not necessary that the tenant (or member of his family) should be in occupation of *the whole* of the property which is the subject of the tenancy, provided that he is in occupation of a dwelling-house comprised in it. Thus, if the whole subject of the tenancy is a block of flats, section 1 will be satisfied if the tenant is residing in one of the flats in the block. The fact that he has sub-let the remainder of the property will not deprive him of protection if he is residing in part of it. The Act does, therefore, protect some interests which are in part (perhaps mainly) investment interests, but it cannot protect a tenant who is not residing in any part of the property and whose interest is wholly that of an investor.

Although it is necessary that the tenant (or a member of his family) should be residing in a part of the property immediately before the expiry of the lease, it is not necessary that he should have been in occupation for any specific length of time before such expiry. Thus the purchaser of the " fag-end " of a lease is as much protected as a tenant who has been in occupation for many years. No qualifying period of residence is laid down.

No limit of rateable value has been laid down for the premises covered by Part I. Thus it applies to premises outside the rateable value limits of the Rent Restrictions Acts as well as to premises within these limits. The Act will, therefore, assist those tenants of dwelling-houses within the rateable value limits of the Rent Restrictions Acts who are deprived of protection under these Acts because their tenancies were at rents less than two-thirds of the rateable value: section 12 (7) of the 1920 Act.

### Long Leases Covered by Part I: Meaning of " Term of Years Certain "

In order that Part I should apply, there must have been a tenancy which was originally granted for a term of years certain exceeding twenty-one years. Most leases for terms exceeding twenty-one years are in fact ground leases, but the Act does not attempt to confine the protection of Part I to ground leases. Ground leases, although not difficult to recognise, are not too easy to define with complete success. It is quite possible to pick holes in the definition of a ground lease which was attempted in section 24 of the Landlord and Tenant (War Damage) Act, 1939. The Government has preferred to take the simpler course of applying Part I to cases where the lease originally granted was for a term exceeding

twenty-one years, even if this brings certain leases at a rack rent within the scope of its provisions. It will clearly include ground leases and if it includes a few leases which are not ground leases no serious harm is done. It is, however, primarily ground leases and the position of the occupying ground lessee that Part I has in mind.

It has been suggested that a lease for a term exceeding twenty-one years but containing an option to determine (such as the familiar "break clause") at a date earlier than twenty-one years is not a term of years certain exceeding twenty-one years. It is submitted that this is incorrect, both upon authority and upon the Act itself. The Act contains a definition of a "notice to quit" (section 20 (1)) which is fairly conclusive, since it states that a "notice to quit" includes a notice to determine a term of years certain. This clearly indicates that a term may be certain although liable to determination by notice, under a provision in the lease, before its normal date of expiry by effluxion of time. The truth is that the "certainty" of a term of years certain is the certainty that it will come to an end by effluxion of time at a definite date unless it is determined earlier, as it may be by virtue of a forfeiture clause or an option to determine. It does not mean that it is certain *to endure* until the date fixed for the expiry. Its *maximum* duration is, however, certain in contrast to a periodic tenancy which will go on indefinitely until it is terminated. This is in line with old authority (*b*). The decision in *Weston* v. *Savage* (1879), 10 Ch. D. 736, can hardly be regarded as throwing any doubt upon the accepted doctrine. In that case it was held that a purchaser who had contracted to purchase a term for at least twelve-and-a-half years was entitled to repudiate when it was discovered that the term was subject to an option exercisable by both the lessor and the lessee to determine it earlier. This decision is quite intelligible as a decision on what a purchaser was entitled to expect under his contract, but it is far from being a decision that a term of years, subject to an option to determine, is not as a matter of definition a term of years certain.

### "The Tenant or a Member of his Family"

It is a condition of protection that the tenant or a member of his family was residing in a dwelling-house comprised in the tenancy immediately before the normal date of expiry of the lease.

(*b*) See 2 Bl. Com. 143; Shep. Touch. 267; Co. Litt. 45b; *The Bishop of Bath's Case* (1605), 6 Co. Rep. 34a; *Say* v. *Smith* (1561), Plowd. 269; *Messenger* v. *Armstrong* (1785), 1 T. R. 53; *Goodright* d. *Hall* v. *Richardson* (1789), 3 Term. Rep. 462; *Cobb* v. *Stokes* (1807), 8 East 358; *Roberts* v. *Hayward* (1828), 3 C. & P. 432; *Lace* v. *Chantler* [1944] K. B. 368; see also s. 205 (1) (xxvii) of the Law of Property Act, 1925, which is, however, not very useful on this point.

"Family" is not defined, but it is thought that the decisions on the meaning of the expression in section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and section 3 (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, will be applicable. The Court of Appeal have laid it down that the test for deciding whether a person comes within the description of a member of the family is whether an ordinary man would so regard him. This test is simple in conception, like that of the reasonable man in the law of negligence, but is apt to be imprecise in application. Its scope has in fact had to be progressively defined by litigation (*c*). No doubt it has been considered less arbitrary to rely upon the results of this litigation than to introduce a rigid statutory definition into the Act, like that in section 13 (1) of the Landlord and Tenant (Requisitioned Land) Act, 1942.

### Terms of Continued Tenancy

Subject to certain provisions of the Act which will be mentioned later, the tenancies which are continued by section 1 are continued on the old terms and conditions. In particular the rent payable will remain the same. Thus, if the rent payable was a ground rent, as it will be in the majority of cases, the tenant will continue to pay a ground rent for the period during which the tenancy is continued. The effect of the Act is to postpone for two years the landlord's expected reversion to the rack rent, with a somewhat uncertain prospect thereafter. Thus the terms of the investment in the case of one class of ground rents, namely, where the ground lease is held by the occupying tenant, have been altered by Parliament. It remains to be seen how this legislation, and the permanent legislation which is to follow, will affect the attitude of the property market to ground rents as investments.

### Section 2: Application to Expired Tenancies

Section 2 of the Act extends protection to the occupier in cases where long leases of the kind mentioned in section 1, namely, leases originally granted for terms certain exceeding twenty-one years, have *already expired* before the commencement of the Act. Section 2 is in many ways a remarkable section. It applies where the person who was the tenant immediately before the expiry of the

(*c*) See particularly *Price* v. *Gould* (1930), 143 L. T. 333; *Brock* v. *Wollams*, [1949] 2 K. B. 388; *Standingford* v. *Probert*, [1950] 1 K. B. 377; *Jones* v. *Whitehill*, [1950] 2 K. B. 204; *Gammans* v. *Ekins*, [1950] 2 K. B. 328; *Langdon* v. *Horton*, [1951] 1 All E. R. 60; *Darnell* v. *Millward*, [1951] 1 All E. R. 88; *Turkham* v. *Perry*, [1951] 1 All E. R. 249; *Perry* v. *Dembowski*, [1951] 2 All E. R. 50.

lease, or a member of that person's family, has continued until the commencement of the Act to reside in a dwelling-house comprised in the property which was the subject of the tenancy, either by virtue of a new tenancy (whether express or implied) which reserves the same rent as the original tenancy, or as merely "holding over" without any new tenancy having been created at all. If a new tenancy has been created, it must, in order to fall within section 2, be one which would expire by effluxion of time, or be terminable by notice to quit, earlier than two years from the commencement of the Act. Not only must the new tenancy reserve the same rent as the original tenancy, if section 2 is to apply, but it must not have been granted in consideration of a premium, however small. If a different rent has been substituted, or if a premium has been taken, the Act recognises an unequivocal intention to treat the old contract as superseded, and refrains from interfering with that intention. The effect of section 2 where it applies is to bring about a notional resurrection and continuance of the old tenancy (subject only to the modifications of the Act) as if it had originally been created for a term expiring at the end of two years from the commencement of the Act.

It has already been mentioned that section 2 applies in cases where no new tenancy was entered into after the expiry of the long lease, but the ex-tenant (or a member of his family) merely holds over. This clearly includes wrongful holding over, and it is, therefore, true to say that the Act may in some cases afford protection to trespassers. It is, however, only a special kind of trespasser who can receive protection from the Act, namely, a trespasser who has been a tenant or, at least, has been related to a tenant. The Act goes so far as to protect a person who has been holding over even if there is outstanding against him an unsatisfied Court order for possession (First Schedule, para. 4), which ceases to have effect. There is a striking contrast between the fortunes of the contumacious ex-tenant who has held on in defiance of Court orders and so forth and the law-abiding tenant who quitted when his lease expired. The former's trespass is legalised and he will enjoy, as will be seen, a moratorium in respect of liability for non-repair. The latter may well have found that his respect for the law has not only deprived him of at least two years' possession but has earned him the parting gift of a heavy bill for dilapidations against which he can claim no relief.

In cases where the holding over is not wrongful, but in pursuance of an implied tenancy, it must not be too readily assumed that the holding over is at the same rent as under the expired tenancy.

Unless it is at the same rent, section 2 will not apply. If following upon the expiry of the old tenancy there have been negotiations in the course of which the landlord has asked for an increased rent, the Court may refuse to assume that the holding over is at the old rent, particularly if the old rent is a ground rent. The proper inference may be that the tenant is bound to pay a " reasonable satisfaction " for his use and occupation. The case of *Thetford Corporation* v. *Tyler* (1845), 8 Q. B. 95, is instructive in this connection.

Part II of the First Schedule contains special provisions to deal with the case where a tenant who has held over after the expiry of a tenancy which falls within section 2 has died before the commencement of the Act, leaving one or more members of his family in occupation of the property. The Legislature has gone very far in the system of protection which it has devised in section 2.

### Provisions as to Assignment or Sub-Letting of Continued Tenancy

Although a tenancy continued by virtue of section 1 or section 2 is assignable, there is a special provision in section 3 which is designed to check the exploitation for profit of the protection given by Part I of the Act. Section 3 enables the landlord to give notice (which must not be less than a month's notice) to determine the tenancy if the tenant has assigned *the whole or part* of the living accommodation comprised in the tenancy, or if *the whole* of such accommodation has become sub-let. It is important to notice that the landlord's power to determine is given in the event of the assignment of the whole *or part* of the living accommodation, but only in the event of the sub-letting of *the whole*. Parliament appears to have two objects in mind in making this distinction. First, it appears to have been thought reasonable that the tenant should be allowed to sub-let part, in order to make some accommodation available to others. Secondly, however, it was necessary to prevent the evasion of the Act's purposes which could have taken place if the tenant had been allowed to assign part as well as to sub-let part. By a combination of assignment and sub-letting he could have parted with possession of the whole of the premises for purposes of profit.

### Restrictions on the Enforcement of Covenants by the Landlord

Section 5 gives the tenant protection against the forfeiture of the continued tenancy during the two-year period from the

commencement of the Act, and against its destruction by the forfeiture of a superior tenancy. The same protection is given to a tenancy which has not yet reached its normal date of expiry but which will be protected by section 1 when it does so. The only exceptions to the restrictions upon forfeiture are cases where the landlord is seeking to forfeit the tenancy for non-payment of rent or rates, failure to carry out an obligation to insure or keep insured, or to refrain from using the property for illegal or immoral purposes. In addition to this restriction on the right of forfeiture, section 5 postpones until the end of the two-year period any right of action for damages against the tenant for failure to comply with any term or condition of the tenancy. It will be noted that an action for non-payment of rent, not being an action for damages, is not affected by this suspension. Further, section 5 does not affect the remedy of injunction, and section 5 (3) makes it clear that in suitable cases an injunction may be sought in the county court in spite of the county court rule that the grant of an injunction is ancillary to other relief (which, owing to the suspension of the right to claim damages, will not be claimable in this case).

Parliament has clearly taken the view that the two-years' moratorium given by section 1 and section 2 would be rendered illusory if some restriction were not placed on the landlord's remedy of forfeiture and his right to claim damages. Most tenancies of the kind protected by sections 1 and 2 would be in danger of forfeiture for failure to carry out repairing obligations, and if a judgment for damages could be obtained the threat of enforcing it would in many cases be sufficient to compel the tenant to quit.

One of the most important covenants affected by section 5 is obviously the covenant to repair. The need to do something to guard against serious deterioration in the condition of properties as a result of neglect to repair has, however, induced Parliament to give the landlord a limited remedy in bad cases. This is provided by section 6.

### The Problem of Non-Repair: Landlord's Right of Self-Help

Section 6 goes some way to meet the danger that section 5 might, if it stood alone, result in a serious deterioration in the condition of dwelling-houses which are affected by Part I of the Act. Section 6 enables the landlord or his agent (whether or not the tenancy gives such a right) to enter and examine the state of repair, and to carry out any repairs which may be reasonably necessary to prevent or arrest serious depreciation of the property or of adjoining property.

He may recover the cost of such repairs from the tenant if the expenditure was reasonably required because of the tenant's failure to carry out his repairing obligations under the tenancy, whether or not the tenancy gives such a right of recovery, but (it is important to note) this right of recovery is *suspended* during the period of two years from the commencement of the Act or the period of the tenancy if shorter. Section 6 gives the right to enter and do necessary work not only to the tenant's immediate landlord but also to a superior landlord. If the superior landlord does the work and recovers the cost from the mesne tenant, the latter can recover it from his own tenant, if the cost was incurred by reason of the tenant's failure to carry out his repairing obligations. It is clear that the value of the landlord's suspended right of recovery may depend not only upon the tenant's personal circumstances when the right becomes exercisable, but also upon the terms of the permanent landlord and tenant legislation which is to be introduced.

### Position of Sub-Tenants at the End of Long Leases: the "Knightsbridge Case"

As has been mentioned earlier in this article, it was held in the case of *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, [1950] 2 K. B. 228, that the sub-tenant at a rack rent of a dwelling-house within the rateable value limits of the Rent Restrictions Acts was not protected under the Acts upon the expiry of a superior tenancy which was itself excluded from the Acts (as a result of section 12 (7) of the 1920 Act) because the rent payable under it was less than two-thirds of the rateable value. Parliament has decided to give protection to sub-tenants who would be affected by this decision by means of a temporary device rather than by an amendment of the Rent Restrictions Acts. The mechanism adopted is to preserve for the sub-tenant against the superior landlord for a two-year period such protection as he enjoyed against his immediate landlord during the currency of the latter's long lease. In effect there is a notional assignment to the superior landlord of the rights and liabilities of the immediate landlord vis-à-vis the sub-tenant. In order that section 7 should apply the superior tenancy must have been granted for a term of years exceeding 21 years but the sub-tenancy must not itself have been granted for such a term, and it must have been a "lawful" sub-tenancy. If a sub-tenancy has been granted for a term exceeding 21 years the sub-tenant's protection, if any, must be derived from section 1. Not only an immediate but a derivative sub-tenant may be eligible for protection under section 7; in other words the occupier under the last of a chain of sub-tenancies

may be protected. Section 7 (2) extends protection to cases where the superior tenancy has already come to an end before the commencement of the present Act, but the former sub-tenant has been holding over under conditions similar to those described in section 2.

Clearly, as a result of section 7, a sub-tenant, and those claiming under him will be able to rely on any protection under the Rent Restrictions Acts which would have been available if the superior tenancy had continued; *e.g.*, the widow of a statutory sub-tenant can claim a transmitted statutory tenancy under section 12 (1) (g) of the 1920 Act.

It is with some trepidation that one ventures to dispute a statement made by the Senior Law Officer of the Crown, but it is difficult to agree with the suggestion of the then Attorney-General, Sir Hartley Shawcross, in moving the Second Reading of the Bill for the present Act, that section 7 does not deal with *Cow* v. *Casey*, [1949] 1 K. B. 474 (*d*). It will be recalled that it was held in that case that when the superior tenancy of a dwelling-house outside the Rent Restrictions Acts limits came to an end the sub-tenant of a part (which was itself a dwelling-house within these limits) was not protected. It is submitted that, despite the Attorney-General's disclaimer, if a house which is outside the rateable value limits of the Rent Restrictions Acts has been let for a term exceeding 21 years, and the tenant has sub-let *the whole* of it in portions which are themselves dwelling-houses within the limits of the Acts, the sub-tenants are protected by section 7 if the superior tenancy comes to an end within the two-year period and the other conditions of section 7 are fulfilled. If, however, only a part has been sub-let, section 7 will not apply. In that case it is the superior tenant himself who is eligible for protection under section 1.

A curious result of section 7 is that it appears to protect the sub-tenant of the whole of a dwelling-house outside the Rent Restrictions Acts in one case—namely, where the superior tenancy is determined by forfeiture within the two-year period. Such a sub-tenant has, of course, in addition the protection of section 146 (4) of the Law of Property Act, 1925.

The proviso to section 7 (1) makes it clear that any rights which a sub-tenant may have by virtue of section 139 of the Law of Property Act, 1925, are not cut down by section 7 of the present Act.

(*d*) See H. of C. Official Report, December 6, 1950, c. 406: "It was not and never has been the intention of this Bill to deal with *Cow* v. *Casey* ".

### Miscellaneous Matters Under Part I

Section 4 enables a tenant who does not wish his tenancy to be continued, or who wishes to stop the continuation, to prevent section 1 from applying, or to bring a continued tenancy to an end, as the case may be, by giving not less than one month's notice to his landlord. Sections 8 and 9 deal with special cases, tenancies and sub-tenancies held on trust, and leases for lives.

## *Part II of the Act: Protection for Shop Tenants*

### General

Part II of the Act follows fairly closely the provisions of the Tenancy of Shops (Scotland) Act, 1949, which appears to have worked satisfactorily. Part II enables the tenant of a shop, including mixed residential and shop premises, to apply for renewal of his tenancy if it comes to an end immediately before the commencement of the Act or within a period of two years from that date. The reference to tenancies coming to an end immediately before the commencement of the Act is intended to cover shop tenancies which expired at midnight on June 23, 1951. Certain yearly shop tenancies beginning on Midsummer Day would have expired by virtue of a notice to quit at that time. It is perhaps worth noting that Part II can apply to periodic tenancies, however short their periodicity. Thus the weekly shop tenancies which are to be found in some districts are covered.

Part II does not extend to business premises other than shops within the meaning of the Act. Shops mean premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business as defined in the Shops Act, 1950. "Pubs", however, which are within the Shops Act, are not within the present Act. Licensed restaurants are within the present Act provided that their receipts from alcoholic refreshment are less than three-fifths of their total receipts. A hairdresser's establishment is within the present Act, and so is a commercial lending library, but not a place which receives clothing for dry or other cleaning.

Part II applies to the following cases (section 10 (2)):—

(a) the simple case where the whole subject of the tenancy is a shop;

(b) where the subject of the tenancy is mixed, consisting of a shop and living accommodation, and the living accommodation is occupied wholly or mainly by the tenant or by a person employed by him for the purposes of the shop; or

(c) where the subject of the tenancy is composite, and includes

physically separate parts, *one* of which is a shop or is a unit consisting of combined shop and living accommodation, occupied as above.

In cases (a) and (b) the new tenancy granted by the Court will extend to the whole subject-matter of the old tenancy. In the case of (c), unless the landlord requires the grant to cover the whole subject of the old tenancy, the composite whole will normally be split and the new tenancy will extend only to the physically separate shop or to the unit of mixed residential and shop accommodation. Where, however, a composite tenancy includes a physically separate shop and a physically separate unit of living accommodation occupied by the shop tenant or his employee, then, assuming that the landlord does not *require* the renewed tenancy to extend to the whole subject-matter of the expiring tenancy, an application may be made to the Court to grant a tenancy extending to both these parts. The Court will normally do so, but it may in its discretion grant a tenancy of the shop part only. The question whether a part is "separate" is one which is for the Court to decide at the hearing of the application.

It is worth noting that the renewed tenancy granted by the Court is assignable, subject to the terms and conditions of the tenancy.

### Time Limits for Applications

It is not proposed to deal in detail in this article with section 11, but the provisions of that section in regard to time limits must be most carefully studied, as failure to make an application in time is fatal. In cases where the expiring tenancy is a fixed term the application for renewal must be made not later than one month before the date on which the tenancy would expire. Section 11 (2), however, enables a landlord, not earlier than four months before the normal date of expiry, to serve a notice on the tenant requiring him to elect within a month from the date of service whether or not to make an application. By this means the landlord can compel the tenant to declare his intentions. The form and contents of the notice are prescribed by the Leasehold Property (Temporary Provisions) (Shops) Regulations, 1951 (SI 1951, No. 1215), made by the Lord Chancellor under section 11 (2). In cases where the tenancy is a periodic one, terminable by notice to quit, the tenant's application for renewal must be made after the giving of the notice to quit but not later than one month thereafter.

### Terms of Renewed Tenancy: Wide Discretion of Court

Section 12 gives the Court a general discretion, subject to certain conditions, upon an application duly made, to grant a tenancy for a term not exceeding one year at a time, at such rent and upon such other terms as the Court may consider reasonable. The wide discretion given to the Court is similar to that conferred on the Sheriff Court by the Tenancy of Shops (Scotland) Act, 1949. It is provided that in fixing the rent, terms and conditions the Court is to disregard any considerations arising from the personal circumstances of any of the parties. Presumably by this is meant such circumstances as the financial bad luck of the tenant or his domestic responsibilities.

The Court is given no formula for determining a reasonable rent. The whole matter has been left to the county court judge, " sitting ", in the words used by the then Attorney-General, " like a Cadi under a palm tree " (*e*). It seems clear that, in the case of mixed shop and residential premises within the Rent Acts the Court will not be precluded from fixing a rent above the standard rent: cf. *Rose* v. *Hurst*, [1949] 2 K. B. 372.

### When New Tenancy is not to be Granted

The Court is directed *not* to order the grant of a new tenancy if it is satisfied of the existence of any one of five sets of circumstances. These are, very briefly expressed, material breach of covenant by the tenant; offer on reasonable terms of suitable alternative accommodation by the landlord; premises reasonably required by the landlord for demolition or reconstruction; " the public interest ", where a public authority has an interest in the premises; and " greater hardship " from granting than refusing a new tenancy.

### Co-ordination of Present Act with Part I of the Landlord and Tenant Act, 1927

The intention underlying section 14, which deals with the relation between the present Act and the Landlord and Tenant Act, 1927, appears to be that the present Act should interfere as little as possible with the operation of the 1927 Act, that it should neither destroy accrued rights under that Act nor give rise to new rights under it which would not otherwise have arisen. The effect of section 14 may be summed up in the following five points.

(a) The renewed tenancies granted under Part II of the present Act are not to be treated as tenancies upon the termination

(*e*) H. of C. Official Report, February 5, 1951, c. 1427 and c. 1430.

of which the various rights given by Part I of the 1927 Act arise.

(b) Notwithstanding the grant of a renewed tenancy under Part II of the present Act, a tenant will be treated as quitting the holding at the termination of his original tenancy, with the result that his rights to compensation for improvement and for goodwill, if any, will not be affected by the fact that he remains in occupation.

(c) For the purpose of computing the five-year period specified in s. 4 (1) of the 1927 Act, any period of occupation under a renewed tenancy granted by virtue of Part II of the present Act will be disregarded, but such occupation will not be deemed to break the continuity of the immediately preceding and suceeding periods.

(d) Renewals of tenancy under the present Act are excluded where the landlord serves notice under section 2 (1) (d) or section 4 (1) proviso (b) of the 1927 Act, offering to renew the tenancy at such rent and for such term as, failing agreement, the 1927 Act tribunal considers reasonable.

(e) A 1927 Act tribunal which has made an interim order under section 5 (13) of that Act, and subsequently decides not to grant a new tenancy under section 5 (2) thereof, may direct that possession under the interim order shall be treated as if it were a tenancy granted under Part II of the present Act. In that case the 1927 Act tribunal is given power to direct the time within which an application for a grant of a further new tenancy under Part II of the present Act shall be made. In order that this provision may apply, the tribunal must have made an interim order. The tribunal would not have power to give the direction if, instead of an interim order, the landlord has given an undertaking not to dispossess the tenant before the termination of the proceedings for a new lease: *British and Colonial Furniture Co., Ltd.* v. *William McIlroy, Ltd.*, [1951] 1 All E. R. 404.

### Miscellaneous Matters

There is a right of appeal from any determination or order of the Court under Part II, with the leave of the Court. The Court is the county court and the appeal will, of course, be to the Court of Appeal.

Save where otherwise expressly provided, the Act binds the Crown and Government Departments. There are two special

provisions affecting the Crown and other public authorities in relation to Part II. The first is in section 12 (3) (d) where a " public authority ", which includes not only Government Departments but also local authorities, statutory undertakers and development corporations, may resist an application for a renewed tenancy on the ground that renewal would be contrary to the public interest. It will then be for the county court judge to decide the matter. He is directed to refuse an order for a new tenancy if he is satisfied that, where there subsists in the premises an interest belonging to a public authority, in the public interest a new tenancy ought not to be granted. The second provision, a more drastic one, can only be invoked by Government Departments. This provision, in section 16 (2), deprives the Judge of jurisdiction to order a new tenancy, upon production of the mere certificate of the department. If the department is satisfied that for reasons of national security it is necessary that the use or occupation of the land should be discontinued or changed, it may certify that section 16 (2) applies, and in that case no order for a new tenancy can be made under Part II.

Sections 13 and 17 provide the legal machinery which is required to deal with cases where a sub-tenancy is prolonged beyond the term of a superior tenancy. This is a mere matter of machinery and need not be dealt with in detail here.

Section 9 applies the provisions of section 23 of the Landlord and Tenant Act, 1927, to the service of notices under the present Act. Section 20 is the interpretation section. Section 21 deals with the commencement and extent of the Act. The Act came into operation on June 24, 1951, and extends to England and Wales only. Provisions similar to those of Part I of the Act have been made for Scotland by the Long Leases (Temporary Provisions) (Scotland) Act, 1951. Shop tenants in Scotland already have protection, similar to that given by Part II of the present Act, under the Tenancy of Shops (Scotland) Act, 1949.

*Note.*—At the time of going to press the procedure for applications to the county court for a new tenancy under Part II of the Act has just been published. A new Order 40A, laying down the procedure, has been made: see the County Court (Amendment) Rules, 1951 (SI 1951, No. 1354 (L.7)), which came into operation on August 3.

# RECENT LEGISLATION

By A. Johnson, Barrister-at-Law

## Adoption Act, 1950

This Act, which came into force on October 1, 1950, consolidates, with corrections and improvements of the law introduced to facilitate consolidation in accordance with the Consolidation of Enactments (Procedure) Act, 1949, the English and Scottish Acts relating to the adoption of children. The Acts consolidated include the Adoption of Children Act, 1926; the Adoption of Children (Scotland) Act, 1930; s. 50 (3) of the Children and Young Persons (Scotland) Act, 1937; the Adoption of Children (Regulation) Act, 1939, and the amendment of that Act by Schedule X of the National Health Service Act, 1946, and by ss. 35 to 37 and Schedule III of the Children Act, 1948; the Adoption of Children Act, 1949; s. 2 of the Postponement of Enactments (Miscellaneous Provisions) Act, 1939; and s. 23 (3) of the Industrial Assurance and Friendly Societies Act, 1948.

Five minor corrections of the law have been made in accordance with the Consolidation of Enactments (Procedure) Act, 1949. They are:—

(1) For the purpose of ensuring that, so far as concerns the general rights and duties of parents, it is immaterial in which country an adoption order is made; references to an adoption order in s. 5 (1) of the Adoption of Children Act, 1926, and s. 5 (1) of the Adoption of Children (Scotland) Act, 1930, are to be construed as references to an adoption order within the meaning of either of those Acts. These sections are replaced by s. 10 of the consolidating Act.

(2) Section 36 of the Children Act, 1948, so far as it relates to s. 7 of the Adoption of Children (Regulation) Act, 1939, has been amended in order to make it clear that s. 36 of the Act of 1948 is not to be construed as repealing by implication so much of s. 7 (2) of the Act of 1939 as provides for the cessation of supervision on the making of an adoption order. This amendment removes the need for supervision by the welfare authority of a child placed out by a third party for adoption and legally adopted after the cessation of compulsory school age and before the attainment of the age of eighteen. The replacing provision in the consolidating Act is in s. 30.

(3) The Adoption of Children Act, 1949, provides that a document signifying consent should be sufficient " if the person is named or otherwise described in the document ". Rules of Court made to give effect to that provision, provide that if a person who applies for an adoption order wishes to conceal his identity he can ask the Court to allot a serial number to him for the purpose of the application and the applicant is then to be identified by reference only to the serial number. Doubts have been expressed in the Chancery Division of the Supreme Court as to whether a serial number is a sufficient description of the applicant to satisfy the Act. Section 3 (3) of the Adoption Act, 1949, has, therefore, been amended in order to make it clear that a valid consent to the making of an adoption order can be given by a person to whom the identity of the proposed adopter is unknown if the proposed adopter is distinguished, as prescribed by the rules of Court, in the document produced as evidence of such person's consent in proceedings not attended by the person consenting. S. 3 (3) of the Act of 1949 has been replaced by s. 4 of the consolidating Act. Rules of Court made under the Act of 1949 continue in force (1950 Act, 5th Sch.).

(4) Section 9 (1) of the Adoption of Children Act, 1949, was in the nature of a preface to the substantive provisions of ss. 9 and 10 of that Act, describing the motives for which they were enacted. It is not re-enacted in the consolidating Act.

(5) Section 15, paragraph (e) of the Adoption of Children Act, 1949, has been amended by the insertion at the end of the paragraph of the words " or the disposal of any property by instrument inter vivos " in order to make it clear that the provisions of ss. 9 and 10 of that Act as to the effect of adoptions on the devolution or disposition of property do not affect the law of Scotland relating to the disposal of property by instruments *inter vivos*. The paragraph as amended has been replaced by s. 15 of the consolidating Act.

The Adoption Act, 1950, is in four parts and contains five schedules. Part I relates to the making, effects of, and registration of adoption orders; Part II to adoption societies; Part III to supervision by welfare authorities; and Part IV to miscellaneous and general matters. The transitional provisions are contained in the Fifth Schedule.

### Maintenance Orders Act, 1950

This Act received the Royal Assent on October 26, 1950, and came into operation on January 1, 1951. It applies throughout the United Kingdom. Part I of the Act extends and clarifies the jurisdiction of summary courts in England, Scotland and Northern Ireland in relation to maintenance orders, affiliation orders and certain orders relating to children where the parties reside in different parts of the United Kingdom; Part II provides machinery for the enforcement in one part of the United Kingdom of maintenance orders made in another part of the United Kingdom, and Part III contains general provisions.

*Part I*

Jurisdiction of English Courts.

*Summary Maintenance Orders* (s. 1).

This section confers on Courts in England jurisdiction in proceedings brought by a married woman resident in England against her husband while he is residing in Scotland or Northern Ireland under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, for a maintenance order, with or without an order for the custody of children, if the parties last ordinarily resided together as man and wife in England. No jurisdiction is, however, conferred upon an English Court to make a separation order under s. 5 of the Act of 1895 against a person residing in Scotland or Northern Ireland. Under s. 5 of the Act, the Lord Chancellor may make rules for securing that proceedings commenced in a Court which has no jurisdiction in the place where the parties last ordinarily resided together as man and wife may be removed, on the application of the defendant, to a Court of summary jurisdiction having jurisdiction in that place. Rules for this purpose are contained in Part I of the Maintenance Orders Act, 1950 (Summary Jurisdiction) Rules, 1950 (SI 1950, No. 2035). By way of declaration, it is enacted that an English Court has jurisdiction (a) in proceedings under s. 4 of the Act of 1895 by a woman residing in Scotland or Northern Ireland against a man residing in England; and (b) in proceedings by or against a person residing in Scotland or Northern Ireland for the revocation, revival or variation of any order made under the said s. 4. An English Court may, on revoking a maintenance order, make a new order granting legal custody of any child of the marriage to the wife and ordering the payment of maintenance in respect of each such child to the wife, or to an officer of the Court or a third person on her behalf, notwithstanding that the parties reside in different parts of the United Kingdom.

*Orders for custody and maintenance of infants* (s. 2).

Jurisdiction is conferred by this section on the Court of summary jurisdiction for the place where the mother of an infant resides to make an order under the Guardianship of Infants Acts, 1886 and 1925, giving the custody of the infant to the mother, whether with or without an order requiring the father to make payments to the mother towards the infant's maintenance, in cases where the father resides in Scotland or Northern Ireland and the mother and infant in England. By way of declaration, it is enacted that a Court of summary jurisdiction in England has jurisdiction (a) in proceedings under those Acts by a person residing in Scotland or Northern Ireland against a person residing in England for an order relating to the custody of an infant (including, in the case of proceedings by the mother, an order requiring the father to make payments to the mother towards the infant's maintenance), and (b) in proceedings by or against a person residing in Scotland or Northern Ireland for the revocation, revival or variation of any such order. Further, where proceedings for an order under s. 5 of the Guardianship of Infants Act, 1886, or s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, relating to the custody of an infant are brought in an English summary Court by a woman residing in Scotland or Northern Ireland, the Court has jurisdiction to make any order in respect of the child under the said s. 5 upon the application of the defendant in the proceedings. But for this last provision, an English summary Court would have no jurisdiction to make such an order on the application of the father, the mother being resident outside England.

*Affiliation orders* (s. 3).

Jurisdiction is conferred upon English Courts in proceedings for an affiliation order under the Bastardy Laws Amendment Act, 1872, or under s. 44 of the National Assistance Act, 1948, or s. 26 of the Children Act, 1948, against a man residing in Scotland or Northern Ireland if the act of intercourse resulting in the birth of the child or any act of intercourse between the parties which may have resulted therein took place in England. Where the mother of the child resides in Scotland or Northern Ireland and the person alleged to be the father in England, an English summary Court having jurisdiction in the place in which the alleged father resides, is given jurisdiction in proceedings by the mother for an affiliation order under the Act of 1872. An English Court by which an affiliation order has been made under any of the Acts mentioned in this section also has jurisdiction in proceedings by or against a person residing in Scotland or Northern Ireland to revoke, revive or vary that order. An

application for an affiliation order under s. 3 of the Act of 1872 may be made to an English Court in respect of a child born before January 1, 1951 (the date of the commencement of this Act), at any time within one year of that date, in cases where the person alleged to be the father resides in Scotland or Northern Ireland if the alleged father ceased to reside in England before the expiration of one year from the birth of the child and the circumstances are such that if he had become resident in England immediately before the application the Court would have had jurisdiction in proceedings under the said s. 3 apart from the provisions of this section.

*Contributions under the Children and Young Persons Act*, 1933, *and National Assistance Act*, 1948 (s. 4).

An English summary Court has jurisdiction in proceedings against a person resident in Scotland or Northern Ireland (1) for a contribution order under s. 87 of the Children and Young Persons Act, 1933, for the recovery from a parent of sums in respect of a child or young person committed to the care of a fit person or otherwise dealt with under that Act or the Children Act, 1948, and (2) for an order under s. 43 of the National Assistance Act, 1948, for the recovery from a spouse or parent of sums in respect of assistance under that Act. An English Court by which any such order has been made may revoke, revive or vary the order notwithstanding that the proceedings are brought by or against a person residing in Scotland or Northern Ireland.

*Jurisdiction of Scottish Courts.*

By s. 6 (jurisdiction of the sheriff in certain actions of aliment); s. 7 (jurisdiction of the sheriff to make orders for custody and maintenance of pupil children); s. 8 (jurisdiction of the sheriff in certain actions of affiliation and aliment); and s. 9 (contributions under Children and Young Persons (Scotland) Act, 1937, and National Assistance Act, 1948); the jurisdiction of the Scottish Courts is extended so as to give them jurisdiction in proceedings against persons resident in England and Northern Ireland. The provisions of these sections in the main correspond with those extending the jurisdiction of English Courts.

*Jurisdiction of Northern Ireland Courts.*

By s. 10 (jurisdiction of Northern Ireland Courts to make orders under the Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland), 1945); s. 11 (jurisdiction of Northern Ireland

Courts to make affiliation orders); s. 12 (contributions under enactments relating to children, national assistance and welfare services); and s. 13 (transfer of proceedings in Northern Ireland); the jurisdiction of the Northern Ireland Courts is extended so as to give them jurisdiction in proceedings against persons resident in England and Scotland. The provisions of these sections in the main correspond with those extending the jurisdiction of English and Scottish Courts.

*Supplemental* (s. 14).

The modifications specified in the First Schedule to the Act consequential on the before-mentioned provisions of the Act have been made in ss. 86 to 89 of the Children and Young Persons Act, 1933; s. 26 of the Children Act, 1948; ss. 90 to 93 of the Children and Young Persons (Scotland) Act, 1937; and ss. 121 to 125 of the Children and Young Persons Act (Northern Ireland), 1950.

*Service of process* (s. 15).

Where proceedings are begun under or by virtue of this Part of this Act in a Court in one part of the United Kingdom against a person residing in another part of the United Kingdom, the summons or initial writ addressed to him in the proceedings may, if it bears an indorsement in the form numbered 1 in the Second Schedule signed by the indorsing authority of that other part, namely, in England a justice of the peace, in Scotland a sheriff, and in Northern Ireland a resident magistrate, be served within that other part of the United Kingdom as if it had been issued or authorised to be served by the indorsing authority. Service of the summons or writ may be proved by means of a declaration made in the form numbered 2 in the Second Schedule or any form to the like effect before a justice of the peace, sheriff or resident magistrate as the case may be. The section is not to be construed as authorising the service of a summons or writ otherwise than personally or as authorising the execution in one part of the United Kingdom of a warrant for the arrest of a person who fails to appear in answer to any process issued under it in another part of the United Kingdom. S. 4 of the Summary Jurisdiction (Process) Act, 1881, does not apply to any process which may be served under this section.

*Part II*

Enforcement of Maintenance Orders.

*Application of Part II* (s. 16).

Registered maintenance orders, *i.e.*, orders made or deemed to be made by an English Court for alimony, maintenance or other

payments under (i) ss. 19 to 27 of the Matrimonial Causes Act, 1950; (ii) the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949; (iii) ss. 3 (2) and 5 (4) of the Guardianship of Infants Act, 1925; (iv) s. 4 of the Bastardy Laws Amendment Act, 1872, s. 44 of the National Assistance Act, 1948, or s. 26 of the Children Act, 1948; and (v) s. 87 of the Children and Young Persons Act, 1933, or s. 43 of the National Assistance Act, 1948 and registered in accordance with the provisions of this Part in a Scottish or Northern Ireland Court, may be enforced in Scotland or Northern Ireland as the case may be, in accordance with those provisions. Broadly speaking, similar orders made by a Court in Scotland or Northern Ireland if so registered in a Court in another part of the United Kingdom may be so enforced in that other part.

*Procedure for registration of maintenance orders* (s. 17).

Application for the registration of a maintenance order is to be made in the prescribed manner to the appropriate authority (*i.e.*, in respect of an order made by a summary Court in England or Northern Ireland, a justice or justices acting for the same place, or a resident magistrate acting for the same petty sessions district, as the case may be, and in every other case, the prescribed officer of the Court which made the order). If upon application so made by or on behalf of the person entitled to payments under the order, it appears that the person liable resides in another part of the United Kingdom and that it is convenient that the order should be enforceable there, the appropriate authority must cause a certified copy of the order to be sent to the prescribed officer of a Court in that other part of the United Kingdom. The Court to whose officer the certified copy is to be sent is, where the order was made by a superior Court, the Supreme Court of Judicature in England, the Court of Session, or the Supreme Court of Judicature of Northern Ireland, as the case may be, and in any other case a summary Court acting for the place in England or Northern Ireland in which the defendant appears to be or, as the case may be, the Sheriff Court in Scotland within the jurisdiction of which he appears to be. When a certified copy of a maintenance order is sent to a Court it must be registered in the Court receiving it and a notice of such registration given to the Court which made the order in which Court particulars of the notice of registration must be registered. Where payments under a maintenance order made by a summary Court in England or Northern Ireland are made to or through an officer of the Court, that officer, if the person entitled to the payments so requests, must make application for the registration of the order but the person at whose request it is made is liable for the

costs incurred in making the application. An order which for the time being is registered under this part of the Act in any Court is not to be registered thereunder in any other Court.

(For rules as to procedure in English Courts prescribing matters for the purposes of Part II of this Act, see rule 73 of the Matrimonial Causes Rules, 1950 (SI 1950, No. 1940), the Rules of the Supreme Court (No. 2), 1950 (SI 1950, No. 1941), and Maintenance Orders Act, 1950 (Summary Jurisdiction) Rules, 1950 (SI 1950, No. 2035) ).

*Enforcement of registered orders* (s. 18).

As a general rule a maintenance order registered in a Court in any part of the United Kingdom may be enforced in that part of the United Kingdom in all respects as if it had been made by that Court and as if that Court had had jurisdiction to make it, and proceedings for or with respect to the enforcement of the order may be taken accordingly. This rule is subject to the following modifications—(i) a maintenance order registered in an English summary Court (not being an order made in Scotland or Northern Ireland for the recovery from spouses or parents of sums in respect of assistance or accommodation under s. 43 of the National Assistance Act, 1948, or under s. 20 of the National Assistance Act (Northern Ireland), 1948, or s. 11 of the Welfare Services Act (Northern Ireland), 1949) is enforceable as if it were an affiliation order made by that Court under the Bastardy Laws Amendment Act, 1872, and the provisions of enactments relating to the accrual of arrears and remissions of sums due under affiliation orders apply; (ii) a maintenance order registered in a Northern Ireland summary Court (not being an order made under s. 43 of the National Assistance Act, 1948), is enforceable as if it were an order made by that Court under the Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland), 1945, and s. 6 of that Act applies accordingly; (iii) an order made in Scotland under s. 43 of the National Assistance Act, 1948, or made under s. 20 of the National Assistance Act (Northern Ireland), 1948, or s. 11 of the Welfare Services Act (Northern Ireland), 1949, which is registered in an English Court is enforceable as if it were made by that Court under the said s. 43; and (iv) an order made under s. 43 of the National Assistance Act, 1948, which is registered in a Northern Ireland Court is enforceable as if it were an order made by that Court under s. 20 of the National Assistance Act (Northern Ireland), 1948. Except as before-mentioned, no proceedings may be taken for or with respect to the enforcement of a maintenance order which is for the time being registered under this Part of the Act.

*Functions of collecting officer, etc.* (s. 19).

Any provision of a maintenance order made in England or Northern Ireland by a summary Court by virtue of which sums payable thereunder are required to be paid through or to any officer or person on behalf of the person entitled thereto is of no effect so long as the order is registered in any Court under this Part of the Act. A summary Court in England or Northern Ireland in which a maintenance order is registered is required, unless it is satisfied that it is undesirable to do so, to order that all payments to be made under the maintenance order (including any arrears accrued before the date of registration) shall be made through its collecting officer or the collecting officer of some other summary Court in England or Northern Ireland, as the case may be, and has power to vary or revoke its order to that effect by a subsequent order. Where, by virtue of the provisions of this section or any order made thereunder, payments under a maintenance order cease to be or become payable through or to any officer or person, the person liable to make the payments is, until he has been given the prescribed notice to that effect, deemed to comply with the maintenance order if he makes payments in accordance with the maintenance order or any order under this section of which he has received notice. Ss. 8 (3) and (4) of the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924 (which regulate the functions of collecting officers in relation to affiliation orders) and s. 7 (2) of the Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland), 1945 (which relates to the remuneration of persons through whom weekly sums are paid under that Act) apply where, by virtue of an order made under this section by a Court in Northern Ireland, payments under a maintenance order are required to be made through the collecting officer of any Court.

*Arrears under registered maintenance orders* (s. 20).

An applicant for the registration of a maintenance order may lodge with the appropriate authority (see s. 17) either (a) where payments under the order are required to be made to or through an officer of any Court, a certificate in the prescribed form, signed by that officer, or (b) in any other case, a statutory declaration or affidavit, as to the amount of any arrears due under the order, and if a certified copy of the maintenance order is sent to the prescribed officer of any Court in pursuance of the application, the certificate, declaration or affidavit must also be sent to that officer. In any proceedings for or with respect to the enforcement of a maintenance order for the time being registered in any Court under this Part, such a certificate, declaration or affidavit sent to the appropriate

officer of that Court is evidence, and in Scotland sufficient evidence, of the facts stated therein. Where a maintenance order made by an English or a Northern Ireland Court is registered in a Scottish Court, the payment of any arrears accrued and due under the order before January 1, 1951, cannot be enforced except with the leave of the Scottish Court, and on an application for such leave, the Court may refuse leave or grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as the Court thinks proper, or may remit the payment of the whole or any part of such arrears.

*Discharge and variation of maintenance orders registered in superior Courts* (s. 21).

The registration of a maintenance order in a superior Court does not confer on that Court any power to vary or discharge the order or affect any jurisdiction of the Court which made the order to vary or discharge it. As regards a maintenance order made in Scotland and registered for the time being in a superior Court, the person liable to make payments under the order may, upon application in the prescribed manner, adduce before the superior Court any evidence upon which he would be entitled to rely in proceedings before the Court which made the order for its variation or discharge. The Court before which evidence has been adduced in accordance with this provision must cause a transcript or summary of the evidence, signed by the deponent, to be sent to the prescribed officer of the Court which made the order and, in proceedings before the last-mentioned Court for the variation or discharge of the order, the transcript or summary is evidence of the facts stated therein.

*Discharge and variation of maintenance orders registered in summary or sheriff Courts* (s. 22).

Where a maintenance order is for the time being registered in a summary Court or a sheriff Court that Court may, upon the application in the prescribed manner by or on behalf of the person liable to make payments under the order or the person entitled to those payments, by order make such variation as it thinks fit in the rate of the payments under the order, but no such variation may impose a liability to make payments in excess of the maximum rate (if any) authorised by the law for the time being in force in the part of the United Kingdom in which the maintenance order was made. For this purpose a Court in one part of the United Kingdom may take notice of the law in force in another part of the United Kingdom and the provisions of s. 15 of the Act apply in relation to the service

of process. Without prejudice to any power of the Court which made a maintenance order to discharge it or vary it otherwise than in respect of the rate of the payments thereunder, no variation is to be made in the rate of the payments under a maintenance order which is for the time being registered in a summary Court or a sheriff Court except as before-mentioned. The person entitled to payments under a maintenance order which is for the time being so registered or the person liable to make those payments may, upon application made in the prescribed manner to the Court by which the order was made, or in which it is registered, as the case may be, adduce in the prescribed manner before the Court to which application is made any evidence on which he would be entitled to rely in proceedings for the variation or discharge of the order; the Court must cause a transcript or summary of the evidence, signed by the deponent, to be sent to the Court in which the order is registered or by which it was made, as the case may be, and in any proceedings for the variation or discharge of the order, the transcript or summary is to be evidence of the facts stated therein.

*Notice of variation, etc.* (s. 23).

Where a registered maintenance order is varied by the Court in which it is registered, notice of the variation must be given in the prescribed manner to the Court by which the order was made; and where such an order is discharged or varied by any Court other than the one in which it is registered, notice of the discharge or variation must be given in the prescribed manner to the Court in which the order is registered. Particulars of any notice given under this section must be registered in the prescribed manner in the Court to which it is given.

*Cancellation of registration* (s. 24).

At any time while a maintenance order is registered in any Court, an application for the cancellation of the registration may be made in the prescribed manner to the prescribed officer of that Court by or on behalf of the person entitled to payments under the order; and upon such an application that officer is (unless proceedings for the variation of the order are pending in that Court) to cancel the registration, and thereupon the order ceases to be registered in that Court. Where, after a maintenance order has been registered in a summary Court or a sheriff Court, it appears to the appropriate authority (see s. 17), upon application made in the prescribed manner by or on behalf of the person liable to make payments thereunder, that that person has ceased to reside in the part of the United Kingdom in question, the appropriate authority may cause a notice to that effect

to be sent to the prescribed officer of the Court in which the order is registered; and where such a notice is sent the prescribed officer is to cancel the registration of the maintenance order, which thereupon ceases to be registered in that Court. Notice of the cancellation under this section of the registration of an order must be given in the prescribed manner to the Court which made the order and particulars of the notice must be registered in that Court. On the cancellation of the registration of a maintenance order, any order made under s. 19 (2) (*i.e.*, an order requiring payments thereunder to be made through a collecting officer) ceases to have effect, but, until the person liable to make payments under the maintenance order receives the prescribed notice of the cancellation, he is deemed to comply with that order if he makes payments in accordance with any order under s. 19 (2) which was in force immediately before the cancellation; with this exception, the cancellation of the registration of a maintenance order does not affect anything done in relation to the maintenance order while it was registered. If by virtue of an order made under s. 19 (2) payments under an order registered in an English or a Northern Ireland summary Court are payable through the collecting officer of any Court, that officer, if the person entitled to the payments so requests, must make an application on behalf of that person for the cancellation of the registration.

*Rules as to procedure of Courts of summary jurisdiction* (s. 25).

The Lord Chancellor is empowered to make rules for regulating the practice to be followed in English summary Courts under this Part of the Act and the Lord Chief Justice of Northern Ireland is empowered to make such rules in relation to Northern Ireland summary Courts. Rules made for the purpose of this Part of the Act may require that any order or other matter required thereunder to be registered in a summary Court shall be registered (a) in England, by means of a memorandum entered and signed by the prescribed officer of the Court in the register kept pursuant to s. 22 of the Summary Jurisdiction Act, 1879; and (b) in Northern Ireland, by means of an entry made and signed by the prescribed officer in the order book kept pursuant to s. 21 of the Petty Sessions (Ireland) Act, 1851.

## *Part III*

GENERAL.

*Proof of declarations, etc.* (s. 26).

Any document purporting to be a declaration made under s. 15 (service of process), or to be a certified copy, statutory declaration, affidavit, certificate, transcript or summary made for the purposes

of the Act or of the rules made thereunder is, unless the contrary is shown, to be deemed without further proof to be the document which it purports to be, and to have been duly certified, made or signed by or before the person or persons by or before whom it purports to have been certified, made or signed. Paragraph 7 of the Second Schedule to the Emergency Laws (Miscellaneous Provisions) Act, 1947 (which relates to the proof of affiliation orders and maintenance orders and of orders for the discharge or variation of such orders), applies to the registration of orders under Part II of this Act, and to the cancellation of such registration, as it applies to the variation of orders; and, for the purposes of that paragraph, (a) a maintenance order registered under such Part II in a summary Court, and (b) any proceeding under that Part relating to a maintenance order of which a memorandum is required to be entered in the register kept by the clerk of the Court pursuant to s. 22 of the Summary Jurisdiction Act, 1879, is deemed to be an order made by that Court.

*General provisions as to jurisdiction* (s. 27).

Nothing in the Act is to be construed as derogating from any jurisdiction exercisable *aliunde* by any Court in any part of the United Kingdom; and it is declared (1) that any jurisdiction conferred by Part I, or any enactment therein referred to, on a Court in any part of the United Kingdom is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom; (2) that any jurisdiction so conferred in affiliation proceedings is to be exercisable notwithstanding that the child to whom the proceedings relate was not born in that part of the United Kingdom; and (3) for the avoidance of doubt, that in relation to proceedings in which the sheriff has jurisdiction by virtue of the provisions of this Act there are the same rights of appeal and of remit to the Court of Session as there are in relation to the like proceedings in which the sheriff has jurisdiction otherwise than by virtue of those provisions.

*Publication of Rules* (s. 29).

The power of the Court of Session to prescribe anything which under this Act is to be prescribed is exercisable by statutory instrument, and the Statutory Instruments Act, 1946, applies to a statutory instrument containing an Act of Sederunt made for that purpose by the Court in like manner as if the Act of Sederunt had been made by a Minister of the Crown. That Act also applies to any rules made under s. 29 of the Summary Jurisdiction Act, 1879, as amended by this Act. Any rule made under this Act by the Lord

Chief Justice of Northern Ireland is deemed to be a statutory rule to which the Rules Publication Act (Northern Ireland), 1925, applies, and is to be printed and published accordingly.

*Repeal and transitory provision* (s. 30).

Section 6 of the Summary Jurisdiction (Process) Act, 1881 (which relates to bastardy proceedings in England and Scotland), is repealed. Transitory provisions applicable pending the coming into force of ss. 15 and 19 of the Justices of the Peace Act, 1949, have been enacted.

### Highways (Provision of Cattle-Grids) Act, 1950

This Act authorises the installation and maintenance in roads of cattle-grids (*i.e.*, devices designed to prevent the passage of animals but to allow the passage of other traffic) with gates or other works on the road, the provision of by-passes over land not comprised within the limits of the road, to facilitate the passage of animals and other traffic unable to pass over a cattle-grid, the alteration or improvement of cattle-grids, by-passes or works provided under the Act and their removal or discontinuance on becoming redundant. The Act received the Royal Assent on July 28, 1950, and extends throughout England (with the exception of the administrative County of London), Wales and Scotland, but not to Northern Ireland. Sections 18 (2) and (3) which relate to the approval by the Minister of Transport of cattle-grids, works or by-passes provided before the commencement of the Act, came into operation on July 28, 1950, and the other provisions of the Act are deemed to have come into operation on that date as respects any such cattle-grids, works or by-passes approved by him. Otherwise the Act is to come into operation on a date to be appointed by the Minister of Transport.

The powers conferred by the Act are exercisable by the appropriate local authorities who are, (i) for any road repairable by the inhabitants at large, the highway authority (which includes the Minister of Transport in respect of trunk roads or special roads provided by him and an urban district council in respect of a county road repairable by them); and (ii) for any other road, the county council, if the road is in a rural district; the county borough council, if the road is in a county borough; the borough council, if the road is in a non-county borough; and the urban district council, if the road is in an urban district (s. 1 (7)). For the purposes of the Act a road is any way along which there exists a public right of passage with vehicles, whether exercisable over the whole or a part only of the width of the way (s. 17 (1)).

An appropriate authority, whether on the representations of owners or occupiers of agricultural land or otherwise, and after such consultation with any such owners and occupiers as they consider necessary, are authorised to provide and maintain a cattle-grid in any road, or partly in the road and partly in adjoining land, for controlling the passage of animals along the road. Where a cattle-grid is provided, the authority must also provide and maintain either by means of a gate or other works on the road or by means of a by-pass, or partly by one of those means and partly by the other, facilities for the passage under proper control of animals and other traffic unable to pass over the cattle-grid, being traffic entitled by law to go along the road (s. 1 (1) and (2)). The appropriate authority may not place any part of a cattle-grid on land falling outside a road, or provide a by-pass over land, not belonging to the authority, other than common or waste land, except so far as it is authorised to do so by an agreement entered into under s. 9 with persons interested in the land. Before determining to place any part of a cattle-grid or to provide a by-pass on common or waste land, the authority must comply with the provisions of the Schedule to the Act (s. 1 (3)). Without prejudice to the provisions of s. 1 (3), the appropriate authority are prohibited from providing a by-pass running along any part of a way over which there is a public right of way unless, after complying with the provisions of the Schedule to the Act, they determine that it is expedient so to do (s. 1 (4)). A cattle-grid, by-pass or works provided under the Act may be altered or improved provided that traffic which before the alteration or improvement could lawfully have gone along the road which the cattle-grid serves will not be prevented from so going along the road (s. 1 (6)).

Where the appropriate authority, after such consultation with owners and occupiers as they think necessary, consider that a cattle-grid is no longer required, they may remove the cattle-grid and other works on the road, in which event the site is to be made good by them. When a cattle-grid has been removed, the authority may direct that a by-pass provided for use in connection with it shall be discontinued and, if so provided in the direction, that as from a date specified the public right of way thereover shall be extinguished. Where such a direction has been given the authority may remove the works provided for the by-pass. A direction discontinuing a by-pass is not to operate so as to extinguish any right of way which existed before the by-pass was provided, and the authority are required on the removal of the cattle-grid to remove any part of the works provided for the purpose of the by-pass as obstructs the exercise of any such pre-existing right of way (s. 2).

Cattle-grids, and any gates or other works on a road provided for use in connection therewith, and any works provided for the purposes of a by-pass are repairable by the appropriate authorities, but where the appropriate authority are also the highway authority, they are not entitled to rely on any exemption from liability for non-repair available to them as the successor to the inhabitants at large, *i.e.*, they cannot rely on the rule that a highway authority are not responsible for non-feasance in the repair of a highway (s. 3 (1)). A by-pass, until discontinued, is in all cases to be treated as a highway repairable by the inhabitants at large for which the authority are the highway authority; the authority, therefore, have the benefit of the said rule in relation to the surface of the by-pass (s. 3 (2)). In Scotland, for the purposes of maintenance and management (including any liability in respect of loss, injury or damage arising therefrom), cattle-grids, by-passes, gates or other works are deemed to be vested in the appropriate authorities for the roads for which they are provided (s. 4).

Where a road which is repairable by the inhabitants at large (in Scotland, is maintained and managed by a highway authority) is intersected, joined or continued by a road for which some authority other than the highway authority are the appropriate authority, the highway authority and such other authority may enter into an agreement as to the exercise by the other authority of that authority's powers under ss. 1 and 2 (*i.e.*, powers as to the provision, removal and discontinuance of cattle-grids, etc.) in relation to the road for which they are the appropriate authority. Any such agreement may provide for the defraying by the highway authority of the whole or part of the other authority's expenses in consequence of the agreement. Any such other authority must not unreasonably refuse to enter into such an agreement and questions as to the terms of an agreement or whether there has been an unreasonable refusal to enter into an agreement are to be determined by arbitration (s. 5).

As respects traffic signs relating to a cattle-grid provided for a road not repairable by the inhabitants at large or to a by-pass provided for use in connection therewith, the appropriate authority for the road are deemed to be a highway authority for the purposes of s. 48 of the Road Traffic Act, 1930 (which provides for the erection and control of traffic signs). The Minister of Transport is empowered to make regulations under the said s. 48 providing for the illumination of traffic signs relating to cattle-grids or by-passes or for the attachment of reflectors to such signs and may give directions to an appropriate authority (other than himself) as to the exercise by them in relation to a cattle-grid or by-pass of their powers of causing

traffic signs to be placed on or near a road. Any such direction is enforceable on the application of the Minister by mandamus (in Scotland, by order of the Court of Session on an application by the Lord Advocate) (s. 6).

Where, after complying with the provisions of the Schedule to the Act, the appropriate authority providing or proposing to provide a cattle-grid on a road where any person has the right to instal a gate or gates determine that the purpose for which the right is exercisable will be adequately achieved by the provision of the cattle-grid, the said right is not to be exercisable, so long as the cattle-grid is provided, except with the approval of the authority, and the authority may require the removal of any gate or gates installed in the exercise of such right before the provision of the cattle-grid or may themselves remove any such gate or gates. Any expenses reasonably incurred in removing a gate in compliance with a requirement of the authority is to be repaid by the authority on demand. Where a gate has been removed in compliance with such a requirement or by the appropriate authority and the authority subsequently remove the cattle-grid, then, if within twelve months after the removal of the cattle-grid any person re-instals a gate in exercise of a right which has been suspended while the cattle-grid was provided, the authority must on demand repay the expenses reasonably incurred in re-installing the gate. Objection is not to be made or proceedings brought in respect of the purported exercise by the authority of their powers to require the removal of a gate or gates on the ground that no right to instal the gate or gates existed, but the purported exercise of those powers is not to effect the question whether any such right existed or prejudice the powers of any authority to protect public rights of way or to prevent or remove obstructions (s. 7).

An appropriate authority may acquire land for the purpose of exercising their powers under the Act by agreement, whether by way of purchase, lease or otherwise, and may be authorised by the Minister to purchase land compulsorily. The Minister may also purchase land compulsorily. In relation to the compulsory purchase of land, the Acquisition of Land (Authorisation Procedure) Act, 1946, applies other than s. 2 thereof which confers temporary powers for the speedy acquisition of land in urgent cases (s. 8). Regulations may be made by the Minister for securing that proceedings for compulsory acquisition are taken concurrently with proceedings for the determination of questions as to the expediency of installing a cattle-grid or providing a by-pass (Schedule, para. 5 (1)).

The appropriate authority may enter into an agreement with

persons interested in any land for the use of the land for the purpose of providing, altering or improving a cattle-grid or by-pass; and in particular there shall be exercisable by the authority and the public such rights over the land as may be specified in the agreement. Provisions may be included in the agreement for payment to persons who are parties thereto in consideration of the use of the land or otherwise in respect of their entering into the agreement. The provisions of any such agreement relating to land in England and Wales bind (a) the interest of any person who is a party to the agreement notwithstanding any devolution of that interest, and (b) any interest of any person which is thereafter created (whether immediately or not) out of that interest; but such an agreement does not in any other way operate so as to prejudice the rights of any person who is not a party thereto or confer upon any other person any right against him. S. 2 of the Forestry Act, 1947 (which empowers tenants for life and other limited owners to enter into forestry dedication covenants), applies to such an agreement as it applies to such a covenant. As soon as may be after an agreement relating to land in England and Wales has become operative it must be registered in the prescribed manner in the register of local land charges by the proper officer of any county borough or county district council in whose area the land, or any part of that land, is situated and it is the duty of the appropriate authority to notify the making of the agreement to such proper officer and to furnish him with all necessary information relating to the agreement. Rules may be made under s. 15 (6) of the Land Charges Act, 1925, in relation to the registration of agreements entered into under these provisions (s. 9).

An appropriate authority may enter into an agreement with any person at whose instance a cattle-grid has been or is to be provided, or any other person willing to make a contribution towards the expenses of the authority under this Act, for the making of such a contribution by that person (whether by a single payment or by periodical payments) either towards all expenditure or towards expenditure of a specified description. Any such agreement may contain incidental and consequential provisions and, in particular, may provide for repayment, to such extent as may be specified, of a contribution towards the cost of installing a cattle-grid in the event of the cattle-grid being removed. In determining whether or not to provide a cattle-grid an appropriate authority may have regard to the extent to which persons who, in the opinion of the authority, will derive benefit therefrom are willing to enter into an agreement to make a contribution towards the expenses of the authority under this Act (s. 10).

The Minister may make regulations by statutory instrument as to the construction or installation of cattle-grids, the provision of by-passes, and the construction of works for the purposes of the Act, and as to their illumination, including the provision of reflectors; and appropriate authorities must, in the exercise of their functions under s. 1 of the Act, comply with any such regulations for the time being in force (s. 11).

The provisions of s. 72 of the Highway Act, 1835, relating to the causing of injury or damage to highways and to the wilful destruction or injury of the surface of highways apply to cattle-grids, gates or other works on a road for use in connection with a cattle-grid, and any gate or other works for the proper control of traffic passing over a by-pass provided under this Act as they apply to a highway (s. 12 (1)). Also, s. 54 of the Road Traffic Act, 1930, which enables a highway authority to recover from persons responsible for extraordinary traffic certain expenses incurred by the authority in repairing a road, has effect in relation to any road to which that section applies as if expenses incurred by the appropriate authority in repairing a cattle-grid provided for the road were expenses incurred by the highway authority in repairing the road (s. 12 (2)).

The Minister may delegate his functions as an appropriate authority under this Act as respects trunk roads (s. 13).

Regulations may be made by the Minister, by statutory instrument, authorising the appropriate authority, in any such case as may be determined by or under the regulations, to provide a cattle-grid off the road; and, as respects the provision of such a cattle-grid, or any cattle-grid provided before July 28, 1950, off the road for which it was provided, the Act is to apply subject to any exceptions, modifications and adaptations as may be provided by the regulations (s. 14).

An appropriate authority is prohibited from carrying out any work in the exercise of their functions under this Act in (a) so much of a road as passes over, or is comprised within the immediate approaches to, a bridge which is repairable by a person other than the authority, (b) so much of a road passing under such a bridge as is within 10 feet of any part of the bridge or of the foundations thereof, or (c) so much (if any) of a road passing above a tunnel provided for the purposes of a railway undertaking carried on in the exercise of statutory powers as is within 10 feet of any part of the tunnel, except with the consent of the person liable to repair the bridge or the person carrying on the railway undertaking. If such consent is refused, the authority may refer the matter to the Minister who

may, after giving the authority and such person an opportunity of being heard by a person appointed by him for that purpose and considering his report, direct that the work may be carried out notwithstanding that the consent has been withheld, but subject to compliance with any conditions which the Minister may impose (s. 15).

The Minister is authorised, with the approval of the Treasury, to make advances to appropriate authorities in respect of the exercise by them of their powers under this Act as if they were highway authorities for the purposes of s. 8 of the Development and Road Improvement Funds Act, 1909.

Cattle-grids, by-passes or works provided before July 28, 1950, under s. 12 of the Cumberland County Council Act, 1948, are deemed to have been provided in pursuance of this Act (s. 18 (1)). The said s. 12 is repealed as from the day appointed for the coming into operation of this Act.

The Minister may, upon application made to him, approve any other cattle-grid, gate, works, or by-pass which was provided before July 28, 1950, either unconditionally or subject to conditions as to the carrying out of work, the conclusion of an agreement for contributions or any other matter, and, as from the giving of unconditional approval or compliance with all conditions imposed by the Minister, the cattle-grid, works or by-pass are to be deemed to have been provided by the appropriate authority under this Act. The appropriate authority are authorised to carry out any work necessary to comply with any condition imposed by the Minister on giving his approval (s. 18 (2) and (3)). These provisions come into operation on the passing of the Act (s. 19 (3)).

Before determining the question (i) whether it is expedient to place a cattle-grid or provide a by-pass on land not forming part of a road and not belonging to the appropriate authority, (ii) whether it is expedient to provide a by-pass on land over which there is a public right of way, or (iii) whether the purpose for which a right to instal gates is exercisable will be adequately achieved by the provision of a cattle-grid, the appropriate authority must publish in two successive weeks in a local newspaper a notice stating generally the question for determination, naming a place within the locality where plans or other descriptive matter may be inspected, and specifying the time within which (not being less than twenty-eight days), and the manner in which, representations may be made. A like notice must also be displayed at the place where the cattle-grid is to be provided; and for this purpose power is given to erect notice boards on the road or adjoining land or to affix a notice to any building or

structure, the consent of the occupier in the case of land off the road which is occupied being obtained. Where no representation is duly made or every representation is withdrawn, the authority may proceed to determine the question. Representations which are not withdrawn are to be forwarded to the Minister by the authority with their observations thereon and proposals for determining the question in the light of the representation. The Minister must consider any representation received by him and cause a local inquiry to be held or afford the person making the representation an opportunity of appearing before and being heard by a person appointed by the Minister for that purpose. If after the Minister has considered the report of such person or the person who held the inquiry, the appropriate authority may, with the consent of the Minister, determine the question in the affirmative subject to compliance with any conditions imposed by the Minister, or, if the Minister is the appropriate authority, he may determine the question. The Minister may dispense with the holding of a local inquiry, or the hearing of the person making a representation, if he considers it unnecessary to take either of those steps. Notice of the determination of the question must be sent by the Minister as soon as may be to any person by whom a representation has been made (Schedule).

### COAL-MINING (SUBSIDENCE) ACT, 1950

This Act received the Royal Assent on July 28, 1950, and came into force on that day. It requires the National Coal Board to carry out repairs and make payments in respect of damage affecting small dwelling-houses caused by subsidence resulting from coal mining and also to execute works to reduce and prevent such damage, where the damage occurred or occurs on or after January 1, 1947, the primary vesting date under the Coal Industry Nationalisation Act, 1946. The Act applies to Scotland but does not extend to Northern Ireland. The dwelling-houses to which the Act applies are:—

(a) a hereditament which is used wholly or mainly as a private dwelling and has a rateable value of £32 (£52, in Scotland);

(b) any such separately occupied part of a hereditament as is used wholly or mainly for the purposes of a private dwelling if the rateable value of the hereditament divided by the number of separately occupied parts thereof does not exceed £32 (£52, in Scotland); and

(c) where a hereditament is used partly (but not wholly or mainly) for the purposes of a private dwelling and has a rateable value not exceeding £32 (£52, in Scotland), such part of the hereditament as is used for the purposes of the private dwelling.

If having regard to changes in the valuation of hereditaments for rating purposes the Minister of Fuel and Power considers that the figures of £32 and £52 ought to be altered he may, by order made with the approval of the Treasury and approved in draft by Parliament, increase or reduce those figures (s. 1).

" Subsidence damage " is structural damage caused by the withdrawal of support from land as the result of the working and getting of coal or any other mineral which is worked with coal, other than damage caused as the result of the working and getting of coal and other minerals, if the working and getting of the coal is ancillary to the working of those other minerals. " Structural damage " is damage to any building or structure, or any sewers or drains, or any pipes, wires or other fixed apparatus installed for the purpose of supplying gas, electricity, water, heating or telephone services (s. 17 (1)). Subsidence damage is deemed to occur at the time when evidence of the damage first appears (s. 17 (2)). A semi-detached house or a house forming part of a terrace or row of houses is deemed to be a separate building and not to form part of a building (s. 17 (3)).

By s. 1 (1) of the Act, the duty is placed upon the National Coal Board, in accordance with the provisions of the Act, to carry out repairs, or to make payments in respect of the cost of repairing, subsidence damage occurring on or after January 1, 1947, which occurs to or affects property which at the time of the occurrence of the damage was a dwelling-house to which the Act applies.

Subject to the provisions of the Act (*e.g.*, as to notices) in respect of damage occurring on or after January 1, 1947, the obligations of the Board are—

(1) Except where repairs have been carried out before July 28, 1950 (the commencement of the Act), either to carry out as soon as possible such reasonable repairs as are required in consequence of subsidence damage or, if they think fit, to pay the cost reasonably incurred by any other person in carrying out such repairs (s. 2 (1));

(2) if repairs were carried out before July 28, 1950, to make a payment equal to the amount (if any) by which the cost reasonably incurred in carrying out the repairs exceeded £5 (s. 2 (2));

(3) if the cost of carrying out reasonable repairs exceeds or would exceed the amount of the depreciation in value of the dwelling-house caused by the damage, the Board may, after consultation with the local authority for the purposes of Part II of the Housing Act, 1936 (in Scotland, the Housing

(Scotland) Acts, 1925 to 1949), for the area in which the dwelling-house is situated, in lieu of carrying out repairs or making a payment in respect of the cost of carrying out repairs, make a payment equal to the amount of the depreciation; if such a payment is made, the local authority cannot require the dwelling-house to be repaired in consequence of the subsidence damage (s. 2 (3));

(4) to pay the reasonable cost of works urgently required in consequence of the subsidence damage, or reasonably required for temporarily meeting the circumstances created by that damage, which have been carried out after July 28, 1950 (s. 2 (4));

(5) where subsidence damage to a part of a building which is not a dwelling-house also affects another part of the building which is a dwelling-house, to pay the cost of repairing the damage apportioned to the dwelling-house if the repairs have been carried out by a person other than the Board: in these circumstances, subject to any agreement between the Board and the owner of the building or other interested party, the reasonable cost of carrying out the necessary repairs to the building is to be apportioned as between the dwelling-house affected by the damage and the other parts of the building so affected having regard to the extent and effect of the damage and all the circumstances of the case (s. 3 (1)); and

(6) where subsidence damage affects a dwelling-house which is part only of a building and the cost of repairing the damage to the building exceeds or would exceed the amount of the depreciation in the value of the building caused by the damage, the provisions of the Act referred to in para. (3) above are not to apply, but the Board may, in lieu of repairing the dwelling-house or making payments as mentioned in paras. (1), (2) and (5), make a payment equal to such part of the depreciation in value of the building as is apportioned to the dwelling-house in the ratio which the annual value of the dwelling-house before damage bears to the annual value of the building before damage (s. 3 (2)).

The amount of depreciation caused by subsidence damage in the value of a dwelling-house or building is to be calculated by reference to the difference in the amounts which the dwelling-house or building might have been expected to realise on a sale of the fee simple of the property in the open market with vacant possession and free from incumbrances, but subject to any easement or other restriction affecting the land, in the state in which it was

immediately before and the state in which it was immediately after the occurrence of the damage, disregarding any increase in the value of the property after the occurrence of the damage due to any right arising under this Act (s. 4 and Schedule, paras. 1–3). In ascertaining the value of property in the state in which it was immediately after the subsidence damage, damage which is not structural damage caused by the subsidence is to be deemed not to have occurred (s. 17 (5)).

Where the work of repairing subsidence damage has been carried out by a person other than the Board, any payment under the Act in respect of the cost of the repairs is to be made to the person by whom such cost was incurred. If the cost was incurred partly by one person and partly by another, the payment is to be apportioned between them as may be agreed or, in default of agreement, in shares corresponding with their respective shares in the cost (s. 4 and Schedule, para. 4).

Payments in respect of the depreciation in the value of damaged property are, unless the property is mortgaged, to be made to the person who is for the time being the owner of the property (where premises are held on a ground lease, the lessee under the lease (s. 17 (1))) provided that if any other person is liable to make good the whole or a part of the subsidence damage, the whole of the payment, or a proportionate part thereof according to the circumstances of the case, is to be made to him, and if the payment is in lieu of a payment of the cost of works carried out before July 28, 1950, the payment is to be made to the person who incurred the cost of the repairs (s. 4 and Schedule, para. 5). Where the Board are satisfied that the interest in damaged property is, at the time a payment in respect of depreciation falls to be made, subject to a mortgage, the payment or a part thereof is to be made to the mortgagee and the mortgagee is liable to account therefor as if the payment had been proceeds of sale arising under a power of sale exercised by him at the same time, except that he is not entitled to credit for any costs incurred by him in connection with the claiming, ascertainment, apportionment or making of the payment. If, however, at the time when such payment is made, the debt secured by the mortgage (other than any part thereof representing costs for which the mortgagee would not be entitled to credit) has been paid in full, the payment is to be made as if the property had not been subject to the mortgage. These provisions as to payments in respect of mortgaged property are to have effect subject to any agreement between the mortgagee and the owner of the

property or other person who would apart from the mortgage have been entitled to receive the payment (s. 4 and Schedule, para. 6).

The Board are not required to carry out repairs or to make any payment under the Act in respect of subsidence damage to property unless the owner thereof or any other person who is liable to make good the damage has given notice in writing to the Board of the occurrence of the damage in the manner, within the time, and containing the particulars prescribed. The owner or such other person must also give to the Board, so far as he is able, reasonable facilities to inspect the premises (s. 5 (1)). Also, the Board are not required to make any payment in respect of repairs to property which have been carried out after July 28, 1950, by any other person unless that person has given, not less than fourteen days before commencing the repairs, notice in writing containing adequate particulars of the proposed repairs and also given, so far as he was able, reasonable facilities to inspect the premises. The requirement to give notices before commencing repairs does not, however, apply in respect of urgent or temporary works (s. 5 (2)). Under the Coal-Mining (Subsidence) (Notices) Regulations, 1950 (SI 1950, No. 1271), the time within which notice of the occurrence of damage must be given is, in the case of damage which occurred before July 28, 1950, six months from that date, and, in the case of damage which occurs after that date, two months from the occurrence of the damage. The time for giving notice may, on application in writing being made in that behalf, be extended by the Minister of Fuel and Power or the Board, whether the time has expired or not, in any case where it appears to him or them that there is reasonable ground for the notice not being or having been given within the prescribed time, or that the liabilities of the Board have not been substantially increased by the delay in giving notice. The form in which the notice is to be given is also prescribed by the regulations. Notices may be served by sending them by post to any office of the Board.

Where it appears probable to the Board that further subsidence damage will occur to a dwelling-house, or to a building comprising a dwelling-house, which has already suffered such damage within such a period as would make it unreasonable that repairs, other than urgent or temporary works, should be carried out to the property, the Board may give written notice to the owner of the property to the effect that they will not carry out any repairs thereto, or make any payment in respect of repairs carried out thereto, while the notice is in force other than urgent or temporary works. The obligations of the Board under the Act are then subject to the terms of the notice. As soon as permanent repairs to the

property can be carried out, it is the duty of the Board to revoke any such notice and any person aggrieved by a failure of the Board to revoke the notice may apply to the county court (in Scotland, the sheriff), when, if it appears to the Court in all the circumstances to be reasonable to do so, the Court may by order revoke the notice. Any such notice may be served by registered post (s. 6).

If after notice of the occurrence of subsidence damage has been given under s. 5 (1) of the Act further subsidence damage occurs to the property in relation to which the notice was given before the end of the period beginning with the occurrence of the original damage and ending either (i) on the completion of permanent repairs to the property, or (ii) on the date (being a date before the completion of permanent repairs) on which it is finally determined (by agreement or otherwise) that a payment in respect of the depreciation in the value of the property falls to be made, the original damage and the further damage are to be treated as one. Accordingly, references in the Act to the time immediately before or immediately after the occurrence of damage are to be construed as references to the time immediately before the original damage and the time immediately after the end of such period respectively and the notice given in respect of the original damage has effect in respect of any further damage occurring before the end of the said period (s. 7).

The Board are empowered, if they consider that subsidence damage is likely to occur to a dwelling-house or to a building comprising a dwelling-house, with the consent of the owner of the property, to execute works therein for the purpose of preventing the damage. If consent is unreasonably withheld and subsidence damage subsequently occurs to the property and, but for the withholding of consent, the damage could have been prevented by the execution of the works, the Board are relieved from their obligations under the Act to carry out repairs or to make payments in respect of that damage. If the extent of the damage subsequently occurring could, but for the withholding of consent, have been reduced by the execution of preventive works, the Board are also relieved from the obligation to carry out repairs and the amount of any payment which the Board would but for this provision have been required or authorised to make under the Act in respect of the damage is to be reduced to a corresponding extent. Where parts of a building which comprises a dwelling-house are in different ownership, this provision does not affect the carrying out of repairs or the making of a payment in respect of any part of the building whose owner has not withheld, or has not unreasonably withheld, his consent to the execution of preventive works. If a person other

than the owner of the property is liable to make good any subsidence damage thereto, he is, for the purpose of this provision, regarded as an owner of the property, and if there are two or more persons so liable (whether the owner is included among them or not) they are all to be so regarded. Where two or more persons are so liable, the county court (in Scotland, the sheriff) may, if it appears to the Court that any of those persons has unreasonably withheld his consent, on the application of any one of them or of the Board give consent on behalf of that person to the execution of preventive works (s. 8).

Where a dwelling-house, or part of a building not comprised in a dwelling-house, is occupied under a lease or tenancy, other than a ground lease, and the landlord has a right to enter, inspect and execute works of repair, those rights are conferred upon the Board for the purpose of performing their obligation under the Act to carry out repairs or execute works. On complaint made by the Board, if it appears to a Court of summary jurisdiction (in Scotland, the sheriff) that the occupier of the property has prevented the Board from exercising those rights, the Court may order the occupier to permit their exercise. The Court may also, on complaint by the Board, confer such powers on the Board and order the occupier of property to permit the exercise thereof in cases where the landlord has no such rights (s. 9).

It is made an offence punishable on summary conviction by a fine or imprisonment or by both a fine and imprisonment knowingly or recklessly to furnish information false in a material particular or, with intent to deceive to withhold any information, for the purpose of obtaining a benefit under the Act (s. 10).

Provision is made for the payment to the Board out of moneys provided by Parliament of grants of not exceeding one-half of their additional expenditure incurred by virtue of this Act subject to a maximum of £1,500,000 for the period ending December 31, 1952, and to a maximum of £250,000 in respect of subsequent years (s. 11).

The county court (in Scotland, the sheriff) has jurisdiction, without prejudice to the jurisdiction of any other Court, to hear and determine any matter arising under the Act. In particular it may by order (1) require the Board to carry out their obligations within a specified time, and (2) award damages in respect of any failure of the Board to carry out their obligations within a reasonable time. The county court (in Scotland, any Court before which proceedings are brought) may summon the assistance of an assessor, whether at the request of any party to the proceedings or not. An assessor,

if so directed by the Judge or Court, may inspect the premises to which the proceedings relate without the Judge or Court and report thereon in writing. A judgment or order may be given or made by the Judge or Court on consideration of the report and any observations of the parties thereon (s. 12).

In proceedings under the Act, where it is shown that the nature of structural damage and the circumstances are such as to indicate that the damage may be subsidence damage, the onus is on the Board to show that the damage is not subsidence damage (s. 13).

A person who, apart from the Act, has any right to claim damages or compensation from the Board in respect of subsidence damage and has also a right to require the Board to carry out works or make a payment under the Act in respect of that damage, may elect which right to exercise and is bound by his election. A notice given to the Board under s. 5 of the Act is deemed to be an election to exercise the right conferred by the Act (s. 14 (1)).

Where the Board were under an obligation before July 28, 1950, to make a payment of damages or compensation in respect of subsidence damage (other than a payment calculated by reference to the weight or area of coal or other mineral the working of which had caused the subsidence) or to make good such damage, and before that date made a payment or executed works in full satisfaction of that obligation, nothing in the Act confers on any person any right against the Board in respect of that damage. Where the Board have, before July 28, 1950, otherwise than in full satisfaction of such an obligation, made a payment in respect of subsidence damage, then, if the person who received the payment or his successor in title would, but for this provision, have a right to require the Board to carry out repairs or make any payment under the Act in respect of that damage, he is not entitled to exercise that right unless he refunds or brings into account the payment so received (s. 14).

The Board is empowered to reimburse expenses incurred by any person for the purpose of securing the carrying out of their obligations by the Board (s. 15).

The power of the Minister of Fuel and Power to make regulations under the Act is exercisable by statutory instrument (s. 16).

# TRUSTS RUNNING WITH THE LAND

By A. Kiralfy, Ph.D., LL.M.

All that is fundamentally necessary in order to specify the beneficiaries of a trust is that they should be certain or clearly ascertainable. We generally divide all trusts into private and charitable trusts. The private trust usually names a certain person as beneficiary or identifies its beneficiary by reference to some family relationship, " on trust for my widow ", or " on trust for the first son of John Smith to attain 21 ". The charitable trust may be for a charitable institution or more broadly for some charitable objects or purposes. On the other hand it is well known that the trust is a flexible institution which has been adapted to many purposes. It is submitted that an entirely valid trust can be created in favour of the owners or occupiers from time to time of a defined parcel of land, with much the same effect as the usual private trust for named beneficiaries. Such a device appears to have practical advantages. It has been resorted to for several purposes but its existence is hardly recognised by any textbooks or literature on the law of trusts. Two of these purposes are the preservation of structures and the preservation of open spaces for neighbouring occupiers.

## Repair and Preservation of Houses

The cases on this subject have generally turned on the application of the perpetuity rule rather than on the problem of uncertainty. A well-known case in other respects is *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399, in which a trust to preserve a certain house from decay, which enured for the benefit of its owners from time to time but which was intended to satisfy the donor's own whims, was held void because it violated the rule against perpetuities. Had it been a public trust for the benefit of occupiers of buildings generally, in some locality, it would have fallen under the law of charitable trusts and been valid (*Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 633). A trust for the upkeep of a house was also held void for perpetuity in *Re Canning*, [1936] Ch. 308. The principle of these cases appears to be that there is some contingency to which the rule against perpetuities can apply. One contingency is the decision to execute repairs and another the amount to be expended. Presumably there is also a contingency

as to the identity of the eventual owner. In an ordinary grant of Blackacre to J. S. in fee simple it is also unknown who will buy Blackacre from J. S. or take it under a devise in his will, and the reason is therefore not clear. Such a trust is, however, judicially considered to be one for a fluctuating group of persons. This may be borne out by comparing two cases. In *Re Drummond*, [1914] 2 Ch. 90, a fund was provided to use the income to pay for holidays of employees of a named firm. This was held bad by Eve, J., who explained (at p. 97): "This is not a trust for general public purposes; it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and, that being so, it is outside the line of authorities cited, and, not being for public purposes, it is not charitable, but is void as infringing the rule against perpetuities". (With this actual decision may be contrasted a more recent decision in the opposite sense where the element of poverty was more emphatic: *Gibson* v. *South American Stores*, [1949] 2 All E. R. 18.) Now one may turn to an "upkeep" case in which the same test was applied. This is a decision of the Judicial Committee of the Privy Council on appeal from Canada, *Kennedy* v. *Kennedy*, [1914] A. C. 215. Here a trust to maintain a residence was held to be void for perpetuity. Lord Parker (at p. 220) put it in this way: "It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities".

In all these cases it appears to be assumed that a proper saving clause as to perpetuity would have made the trusts perfectly valid. The nearest case appears to be one of *Stubbs* v. *Sargon* (1837), 2 Keen 255, in which Lord Langdale, M.R. (upheld on appeal by Lord Cottenham, L.C. at 3 My. & Cr. 507) held that a bequest to the persons to whom the testatrix should have sold her business was valid and not void for uncertainty. Here there was no continuing trust erected and the point was hardly disputable. Lord Parker's words in *Kennedy* v. *Kennedy* (*supra*) do seem, however, to support an extension of this ruling to continuing trusts, provided they are kept within the perpetuity period.

This conclusion is supported by the rule that accumulations to defray the cost of repair of houses are not subject to the restrictions

in L. P. A., s. 164 (*Re Mason*, [1891] 3 Ch. 467; *Vine* v. *Raleigh*, [1891] 2 Ch. 13; order at p. 22; trust for repair during life of annuitant held to be valid) if the perpetuity rule is not infringed.

### Open Spaces

Legal provision for the preservation of open spaces is complicated. There are many general and local statutes. Good use is made of leases and letting schemes, of restrictive covenants, and of tenancies in common (now modified by L. P. A., 1925, Sch. I, Pt. V, para. 2). But in several cases a clear practice appears under which an open space, square or garden is vested in trustees for the benefit of owners or occupiers of adjacent buildings from time to time. Reference may be made to the Report of the Royal Commission on London Squares of 1928 (Cmd. 3196), Appendix III. Spaces vested in trustees for freehold owners or occupiers referred to in that Appendix are 153, 165, 166, 191, 196, 199, 200, 227, 256, 291, 293, 424, 445, 447, 448, 455. A good example is No. 166, in Kensington. The land is vested in trustees on trust for the freeholders of houses abutting on the enclosure and maintained out of rentcharges charged on those houses and reserved when the houses were sold. Purchasers of the houses step into the shoes of the vendors so far as the benefit of the trusts of the open space is concerned, but take liable to the rentcharge and can be evicted unless and until the amount of their contribution to the upkeep of the space is paid. Many of these settlements (*e.g.*, No. 199) specifically provide that the trust shall go on in perpetuity. This appears to be a sound assumption. The modern rule against perpetuities was devised to prevent inalienability of beneficial interests in land, whereas a trust of this kind in no way impedes alienation. It creates something in the nature of an easement or restrictive covenant but identical with neither. Unlike a restrictive covenant it creates rights of positive user. On the other hand it cannot operate as an easement since a *jus spatiandi* or right of recreation is not a right known to our law. One case cited in the Appendix (No. 22) refers to a conveyance of houses abutting on some gardens as conferring on the various purchasers "in perpetuity a right to use the enclosure" (not itself conveyed to the purchaser) "for recreation only, in common with others entitled". Such an arrangement is reasonable, but, save where some special statute applies, it is submitted that it cannot operate under any known principle of law otherwise than by way of trust.

The effect of this type of case is to create what we might term a "cat trust" in distinction from the more usual "dog trust",

borrowing the happy terminology applied to goodwill in *Whiteman* v. *Chaplin*, [1934] 2 K. B. 35. It is a trust which attaches to, or is appurtenant to, land or an estate in land, rather than to any particular person. Hence the rather unorthodox title of the present article.

### Freehold Flats

A recent article in this Journal (14 Conveyancer 350) dealt with the creation of freehold titles to flats, a course for which there is some inclination at the present time. Imagine a large block of flats where this course is to be pursued. You are a prospective purchaser and are asked to pay a large fine or premium for the freehold of a flat. Under the usual law of positive covenants you will be unable to enforce covenants for repair by your neighbours, which may lead to damage to your flat, e.g., removal of support. The " landlord " may, as suggested in that article, be entitled to enforce rights of entry in respect of rentcharges reserved over those other flats, since the failure to repair can be made a breach of covenant annexed to the rentcharge reserved by him. Can you, however, compel him to do so? It is suggested that a solution can be found by vesting all the rentcharges reserved out of all the flats, in trustees, on trust for all the occupiers of the flats, the trustees being obliged to enforce such rights of entry if covenants in any of the sales in consideration of the rentcharges are broken. Here again the rule against perpetuities logically ought to have no application, on the analogy of the law of easements. Since the rentcharges are being used by way of security for the due performance of the covenants the analogy of mortgages, to which the perpetuity rule has no application, might also be used (*Knightsbridge Estates* v. *Byrne*, [1940] A. C. 613).

### Analogies

The validity of such arrangements is certainly assumed in many cases of securities of various kinds. Thus an issue of debentures is often accompanied or preceded by a trust deed under which a trust is created in favour of the debenture holders as a fluctuating class, and not merely for the first holders of the debentures. It has never been argued that such a trust is ineffective, *vide* C. A. 1949, s. 88; *Re Magadi Soda Co.* (1925), 94 L. J. Ch. 217 at 219; Encyc. of Forms (3rd ed.), vol. v, p. 1189. Indemnity rentcharges exist which enure for the benefit of property charged with other rentcharges, in whosoever's hands it may be, and some of these indemnity rentcharges are held on or secured by trusts.

### Conclusion

It is therefore submitted that a valid trust may be constituted in favour of the owners or occupiers from time to time of a specific parcel of land, the benefit of which will enure for successors in title with much the same effect as an appurtenant easement. It is also submitted that a clear trust for owners or occupiers ought not, on principle, to be subject to the rule against perpetuities, where the benefit of the trust is analogous to the benefit of an easement or restrictive covenant. Where the trust is a mere " object trust " and not specifically meant to benefit individuals, or where it deals with sums of money or other substantial benefits not analogous to easements or restrictive covenants the rule against perpetuities should continue to apply. The notion of security for the payment of money should be extended to cases of security for the performance of other obligations, breach of which would cause financial loss.

The conception of the trust has proved adaptable to many new purposes. The law in this field has followed the practices of conveyancers and allowed them validity wherever possible. The practice of " cat trusts " is not new and one of the settlements of open spaces above referred to was executed in 1864, that is to say at a date not very much later than the decision in *Tulk* v. *Moxhay* (1848), 2 Ph. 774, and considerably earlier than the main decision on the law of options to purchase, *L. S. W. Rly.* v. *Gomm* (1882), 20 Ch. D. 562, both of which are new equitable developments. No problem of keeping trusts off the title arises. The rentcharge will be reserved in favour of the trustees and the benefits of the open space or other scheme should appear in the conveyance of the property, as well as the burden of the rentcharge. In the compulsory area a purchaser will also have notice of the existence of such a rentcharge and put on inquiry as to its terms, under s. 49 of the L. R. A. 1925.

# PROPOSED DEMOLITION OF PREMISES: THE LESSOR'S POSITION

By a Correspondent

Important questions arise where a lessor is minded to occupy premises himself at the termination of the lease, or where he proposes to demolish or reconstruct the premises. And a lessor for this purpose may include not only a private individual or a company but even a local or public authority or a statutory or public utility company.

The first question that arises is as to the right of the lessor to recover damages from the lessee for breach of his covenant to leave the premises in repair at the termination of the tenancy. This question falls to be determined by s. 18 (1) of the Landlord and Tenant Act, 1927, which is a general provision, applying to all classes of property. But if the premises are used solely or partly for the purpose of any trade or business, then, at the termination of the tenancy, the tenant may claim a new lease under s. 5 of the Landlord and Tenant Act, 1927, and on such a claim the point will arise whether the lessee's right to a new lease is barred by reason of the fact that the lessor requires the premises for occupation, or for carrying out a scheme of re-development, or that he *intends* to pull down or remodel the premises (see s. 5 (3) (*b*) of the Act).

Certain important decisions have been given by the Courts particularly in relation to the concluding paragraph in s. 18 (1). That section introduced two changes in the previous law. Firstly it provided that a breach of a covenant to *yield* premises in repair at the end of a tenancy should be brought into line with a breach of covenant to *put* premises in repair during the continuance of the term, and that in each case the damages should be limited to the amount of the diminution in the value of the reversion, that is, the value of the property; and such damages accordingly might well fall short of the cost of executing the repairs required by the covenant.

The second part of s. 18 (1) in its concluding paragraph provided that damages should not be awarded where the premises were to be pulled down or structurally altered with the result that the repairs if executed would be rendered valueless. The material words are as follows :—" And in particular no damage shall be recovered for

a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, *would* at or shortly after the termination of the tenancy *have been or be* pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement ".

This provision is difficult to construe and conflicting opinions have been expressed on it. At present, however, the matter must be regarded as concluded by the two decisions of the Court of Appeal in *Salisbury* v. *Gilmore*, and in *Cunliffe* v. *Goodman*.

The Court of Appeal in construing this provision pointed out that it is in oratio obliqua, since it extends not only to the case where the lessor intends to pull down or structurally alter premises, but also to cases where demolition is to take place as the result of a demolition order or a compulsory purchase order made by a local authority.

The Court of Appeal have held, that as regards demolition, etc., by the lessor, the word " intention " must be introduced into the provision, and a tenant, in order that he may be entitled to take advantage of the section, must prove that the lessor, at the date of the termination of the tenancy, had a firm and settled intention to demolish or alter the premises. And a lessor, it seems, cannot have such an intention where his intention is merely provisional and dependent, for example, on such factors as the obtaining of the necessary building licences and planning consents, or the securing of the necessary finance and on the determination whether the proposition will be commercially worth while. Thus, if a new building was proposed to be erected, the lessor would require to know beforehand what was the maximum rent and the maximum selling price fixed by the local authority.

In the earlier case of *Salisbury* v. *Gilmore*, the lessor, on an enquiry from the lessee as to the grant of a new lease, had informed the lessee that he was going to pull down and to rebuild the property, and no notice was received by the lessee of any abandonment of this intention until some two months after the tenancy had ended and the premises had been vacated. The Court, having found on the facts that the lessor had at the date of the termination of the tenancy the intention to pull down the property, held that he was not entitled to damages for the breach of the repairing covenants, and the fact that he had altered his mind subsequently did not alter the position.

In *Cunliffe* v. *Goodman* on the other hand, the Court of Appeal held on the facts that the lessor had not formed any firm intention

to pull down, at the termination of the tenancy, and that the tenant accordingly was liable on the covenant.

How do these decisions, which require the lessor's intention to be firm and not provisional, affect the position where a claim for a new lease is being put forward, and the lessor resists the claim on the ground that occupation is required for himself, or on the ground of a proposed demolition, etc?

It seems that in strictness the same construction must be given to the expression "intention" for the purposes of s. 5 (3) (*b*) of the Act, but if that is so, then landlords will find it just as difficult to resist claims for a new lease on any such ground, as tenants find it difficult to take advantage of s. 18 (1) in resisting claims for dilapidations. There is this to be said however for the tenant, and that is, that where the premises are in fact demolished or structurally altered shortly after the termination of the tenancy, then according to the *dicta* of both Lord Justice MacKinnon and Lord Justice Goddard, as he then was, in *Salisbury* v. *Gilmore*, the tenant would be entitled to succeed.

Indeed the decisions in both these cases present very difficult problems, both as regards the tenant's liability for dilapidations, and his right to a new lease, where the lessor is raising a defence under s. 5 (3) (*b*) of the Landlord and Tenant Act, 1927.

It may be argued, however, that whatever the meaning of "intention" for the purpose of s. 18 (1) of the Act, such a strict meaning is not to be given to it for the purpose of s. 5 of the Act.

In particular, certain of the other provisions in s. 5 would appear to indicate that the meaning of "intention" for the purpose of s. 5 is a much looser one. Thus, for example, under s. 5 (4), where the landlord proves that the premises though not required immediately on any such ground as aforesaid will be so required after the lapse of a certain period, the term of the new lease is not to extend beyond the expiration of that period unless the lease is made subject to a condition that the landlord may at any time after the expiration of that period, on giving not less than six months' notice in writing, resume possession of the premises.

This subsection therefore indicates that a landlord may have the necessary intention to demolish at the termination of the original lease, where he merely proposes to demolish, not immediately, but at a later period, which may be even two or three years thence, or even longer, by which time he will have obtained the necessary licences, permission and the like and made arrangements for the necessary finance.

Furthermore, as far as local or public authorities or statutory

public utility companies are concerned, subs. (6) of s. 5 provides, that where the landlord is such a body, and it is proved that the premises, though not required immediately for the purposes of that body, may be so required at a future time, the tribunal is not to order the grant of a lease unless the lease is made subject to a condition that the landlord may at any time, on giving not less than six months' notice in writing, resume possession of the premises if he requires them for any such purpose.

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## CORRESPONDENCE

### THE SCHOOL SITES ACTS

Dear Sir,

In the May-June issue of *The Conveyancer*, (*ante*, p. 153) it is stated that *Att.-Gen.* v. *Shadwell* is authority for the fact that reverter takes place when the premises cease to be used as a day school and is not prevented from taking place by the fact that the premises continue to be used as a Sunday School or for other parochial purposes. That case clearly is authority for that proposition. At the same time it is, I think, questionable whether it is still good law having regard to the case of *Att.-Gen.* v. *Price*, [1912] 1 Ch. 667. It is true that in *Price's Case* the actual decision was only as to the form of the scheme to be made in that case. But in the course of the case the Court considered the effect of a grant which was indistinguishable in terms from that in *Shadwell's Case*.

It appears from the judgments of Cozens-Hardy, M.R., and Fletcher Moulton, L.J. (who formed the majority of the Court), in *Price's Case* that as a matter of construction they took the view that the grant in that case was made for the purposes of education generally (whether purely secular or not), notwithstanding that the primary object had been religious education of a particular type. (See pp. 678, 683.) Curiously enough this aspect of *Price's Case* seems very largely to have escaped notice. The case is barely mentioned on this point in any of the text books. But as it is a decision of the Court of Appeal (albeit a majority decision) and notwithstanding that Cozens-Hardy, M.R. (at p. 678), expressly preserved the right of the grantor to claim that there had been a reverter, I venture to think that a Judge of first instance at any rate might in the face of that case feel some difficulty in following the narrower construction given by Warrington, J., to the similar grant in *Shadwell's Case*. It is to be noted that the latter case was cited in argument in *Price's Case* but was not mentioned in the judgments.

Yours etc.,
B. G. BURNETT-HALL.

9 Old Square, W.C.2.
12th July, 1951.

# NOTES OF RECENT CASES

## 1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

*Easement—implied reservation—advertisement.*—The decision of Danckwerts, J., in *Re Webb,* [1950] 2 All E. R. 828 (noted Vol. 14, p. 400 *b*), has been overruled by the Court of Appeal, [1951] 2 All E. R. 131. The reasons for the decision in *Simpson* v. *Weber* (1925), 133 L. T. 47, as reported, which were followed by Danckwerts, J., were also disapproved.

It may be remembered that in *Re Webb* there was a lease for twenty-one years of the two upper floors of a house, which it was not disputed in the Court of Appeal, included the outside walls. On these walls were two large advertisements, one of them advertising the goods of the landlord who carried on business on the ground floor of the premises, and the other the goods of a stranger. During a previous lease and for a year after the commencement of the current one, the tenant had made no objection to the landlord about the advertisements, nor did the leases contain any stipulations with regard to them. The tenant then sought by originating summons to find whether the landlord had impliedly reserved a right to maintain the advertisements on the walls.

Jenkins, L.J., criticised the use of procedure by originating summons in a case such as this where there was nothing to construe at all, and whereby the Court was limited to a consideration upon affidavit evidence only of the question contained in the summons.

The Court, after a full consideration of the authorities, and in particular the *dictum* of Thesiger, L.J., in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, at p. 49, affirmed and stressed the principle that in general it is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee, but that there is a general class of exceptions to this rule one of which exists when the grant is made in such circumstances that the facts are inconsistent with any other explanation than that a right was intended to be reserved. (As *per* Lord Parker in *Pwllbach Colliery Co., Ltd.* v. *Woodman,* [1915] A. C. at p. 646.) Therefore as the landlord in the present case could show no more than that the facts were consistent with any state of affairs, but most probably permissive user only, his claim failed.

Their Lordships do not appear to have considered the primary question of whether the right to advertise can be an easement at all (see note, Vol. 14, p. 400 *c*), though the learned Master of the Rolls was clearly influenced by the uncertain nature of the reservations sought to be implied, and did say, " such a reservation as the landlord claims is requisite, so far as I can see, for the effective enjoyment neither of the premises demised nor of the premises retained ".

*Mortgage—statutory trusts—moneylender—Section* 105 *Law of Property Act,* 1925—*Section* 13 *Moneylenders Act,* 1927.—The decision of Harman, J., in *Mathews* v. *Marsden Building Society,* noted *ante* at p. 116, has been upheld by the Court of Appeal *sub nom. Re Martin's Mortgage Trusts,* [1951] 1 All E. R. 1053.

The Court followed Harman, J.'s distinction of *Re Thompson's Mortgage Trusts,* [1920] 1 Ch. 508, but noted that the result of their decision was not very satisfactory. Jenkins, L.J., pointed out that the debt was still owing to the plaintiffs and was still owed by the defendant's estate, though legal process was barred. He suggested that any personal representative who might be appointed, as a condition of payment to him out of Court, should be made first to fulfil the equitable obligation to pay the debt. Morris, J., thought, however, that the contract in question might well be set aside as oppressive and unconscionable, the interest on the debt originally being 82½ per cent.!

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*Registered transfer of land—not a deed inter partes—covenant with a person not a party.*—A. in a registered transfer from B. to A. of certain property with the consent of a building society which held a registered charge upon it, covenanted to pay the principal and interest on the charge and indemnify B. therefrom. A. also covenanted with the building society to pay the principal and interest and all other sums due and perform all the covenants entered into by B. in the registered charge. The transfer contained the usual testatum and was properly executed by B. and A., but the building society was not a party to the instrument. The payments to the building society by a second transferee, C., having fallen into arrear, the society sought to enforce A.'s covenant, and the latter resisted this as the society were not a party to the transfer.

These were the facts in *Chelsea and Walham Green Building Society* v. *Armstrong,* [1951] 2 All E. R. 250. It appears that counsel for the plaintiffs did not take the easiest course open to them, and argue, as noted by Vaisey, J., that the case was provided for by section 56 (1) of the Law of Property Act, 1925, whereby a person may take the benefit of any covenant though he may not be named as a party to the instrument. Instead it was argued, applying the old law, that the transfer was analogous to a deed poll rather than a deed *inter partes,* and therefore any person could sue with whom the covenant was made. (See Norton on Deeds, 2nd ed., pp. 27–29.)

Vaisey, J., after referring to Norton (*supra*), and distinguishing between deeds poll and *inter partes* in that they are public and private respectively, thought that the transfer could not be a deed *inter partes* for "like all these Land Registry transactions it has a quasi-public character". Therefore (applying Norton) as "an indenture not *inter partes* is for this purpose a deed poll" he found for the plaintiffs.

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*Power in the nature of a trust.*—"The authorities do not show in my opinion that there is a hard and fast rule that a gift to A for life

with a power to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show . . . that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A for life with a gift over to such of a class as A shall appoint."

These are the words of Romer, J., in *Re Weekes' Settlement,* [1897] 1 Ch. 289 at p. 292, and applied by Harman, J., recently in *Re Perowne,* [1951] 2 All E. R. 201. The will in *Re Perowne* was home-made, and, after a life interest to the testatrix's husband, there followed the words, " knowing that he will make arrangements for the disposal of my estate according to my wishes, for the benefit of my family after his death ". The husband survived the testatrix but made a void appointment by his will. The question therefore was whether the power was in the nature of a trust or whether it was not, and the estate would devolve upon intestacy.

In following *Re Weekes* (*supra*) and *Re Coombe,* [1925] Ch. 210, the learned Judge thought that he must in this case find an exceptionally clear intention to imply a trust, because were there a trust, by the old rule of construction, the meaning of the word " family " on the exercise by the donee of the power would be wider than on default of appointment. *Grant* v. *Lynam* (1828), 4 Russ. 292. While in the former case the power includes any blood relation, in the latter case the Court would enforce the trust in favour of next-of-kin only, because otherwise the gift would be void for uncertainty. (See Tomlin, J., in *Re Coombe, supra,* at p. 219.)

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*Contract for sale—signature of party to be charged—Law of Property Act,* 1925, *s.* 40.—A new point has arisen on what amounts to a signature of the party to be charged under section 4 of the Statute of Frauds and section 40 of the Law of Property Act, 1925.

In *Leeman* v. *Stocks,* [1951] 1 All E. R. 1043, a dwelling-house was offered for sale at a public auction by the defendant, and the plaintiff's offer, being the highest, was accepted. Before the auction the auctioneer filled in the defendant's name and other details on an ordinary printed agreement form and after the auction he filled in the plaintiff's name and the purchase price, and, with the intention of binding him, asked the plaintiff to sign the document. This he did. The auctioneer told the defendant, who was not dissatisfied, but neither he nor the auctioneer signed the document themselves. The defendant then refused to complete and relied on the absence of his signature on the document so as to make no sufficient memorandum in writing under section 40 of the Law of Property Act, 1925.

Roxburgh, J., found for the plaintiff. " The question," he said, at p. 1045, " is whether, when the vendor by his agent " (the auctioneer), " procured the purchaser to sign the document in order to bind the purchaser by a contract, the vendor was not by his same agent recognising his name which was written at the beginning of the document as the affixing of his mark to the document ". The learned Judge held that

the vendor (the defendant) was so recognising his written name as if he signed it personally following *Schneider* v. *Morris* (1814), 2 M. & S. 286, and *Evans* v. *Hoare,* [1892] 1 Q. B. 593, and that there was therefore a sufficient memorandum in writing.

The learned Judge thought that the most difficult point was whether the document by its terms contemplated that both parties should sign it as in *Hubert* v. *Traherne* (1842), 3 Man. & G. 743, and was therefore in fact insufficient. He thought that on the face of it the document did have that interpretation, but that extrinsic evidence was admissible (and this was recognised by the Court in *Hubert* v. *Traherne*) to show that that was not the parties' intention.

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*Settlement—capital or income.*—Two further cases have been decided resulting from the distribution of the special capital profits dividend on its ordinary stock by Thomas Tilling, Ltd., on facts analogous to *Re Sechiari,* [1950] 1 All E. R. 417. In that case Romer, J., decided that the sum distributed was income in the hands of trustees applying the judgment of the Judicial Committee *per* Lord Russell of Killowen in *Hill* v. *Permanent Trustee Co. of New South Wales,* [1930] A. C. 720 at p. 731.

In *Re Kleinwort's Settlement Trusts,* [1951] 2 All E. R. 328, the facts were, as Vaisey, J., found indistinguishable from *Re Sechiari* (*supra*), but the learned Judge was asked to decide upon the suggested jurisdiction to apportion, a point which was expressly left open by Romer, J., in the earlier case. Vaisey, J., while agreeing that such a jurisdiction may exist in proper circumstances, thought that these were probably limited to those cases in which the Court was mending a breach of trust, and found that in any event there were no special circumstances in the case in question to prevent it coming under the well-settled general rule. "When 'windfalls' have left the parent tree I can see no principle for notionally replacing them on the boughs from which they have fallen."

On the other hand, in *Re Maclaren's Settlement Trusts,* [1951] 2 All E. R. 414, Harman, J., had very different facts before him. The tenant for life had assented to the purchase of the shares in Thomas Tilling, Ltd., as a capital investment, after the intention to distribute capital profits had been announced, and had also requested that the dividend when received in the form of British Transport stock should be sold and reinvested in the purchase of a house for him to live in, as authorised by the settlement. The tenant for life then, on hearing of the decision in *Re Sechiari,* claimed an equitable charge on the house, but the learned Judge could find no equity in him, the property having assumed the guise of capital with the tenant for life's consent, it must remain so.

Harman, J., also discussed the Court's jurisdiction to apportion in special circumstances, referring (*inter alia*) to *Bulkeley* v. *Stephens* (1863), 3 New. Rep. 105. He agreed with Vaisey, J., that these special circumstances are probably limited to cases of breach of trust. In any event the Court, in cases of glaring injustice on the sale or purchase of shares cum or ex dividend, will only order that a more exact

distinction shall be made of capital from income, and does not treat as income that which is capital or vice versa.

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*Sale of a dwelling-house by husband occupied by deserted wife—trespass.*—In *Thompson* v. *Earthy*, [1951] 2 All E. R. 235, Roxburgh, J., had to decide an interesting point, namely, whether a deserted wife whose husband had undertaken before a Court of summary jurisdiction to allow her to occupy the matrimonial home rent free, had any legal or equitable interest in the premises as against a purchaser from the husband.

It would have been surprising had the learned Judge not found for the plaintiff as he did, for he said " I should pause long before declaring the existence of a new species of equitable right hitherto never suggested, especially as the husband himself has a right to apply to the Court for possession against the wife under the Married Women's Property Act, 1882, section 17, whether or not the Court would exercise its discretion in his favour. The plaintiff " (the purchaser), " however, would not apply under that Act, and, therefore, if I were to invent the new equitable interest, she would be in a worse position than the defendant's husband from whom she has purchased ".

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*Failure of offer to pay off mortgage money—right to interest.*—*Barratt* v. *Gough-Thomas* (see note, Vol. 14, p. 400 *e*) has given rise to one final small point, [1951] 2 All E. R. 48, before Danckwerts, J. Shortly, the plaintiff, the mortgagor, had served a notice on the defendant, the mortgagee, to redeem his mortgage in December, 1943, but he did not do so and it was doubtful whether he could have done so at that time. When, after the proceedings previously noted in Vols. 10 and 14, the principal sum was finally paid off, the defendant claimed interest on it down to the date of payment.

The learned Judge, though noting the cases wherein a mortgagee has been deprived of his interest owing to his own fault in delaying the redemption, followed the earlier cases, beginning with *Gyles* v. *Hall* (1726), 2 P. Wms. 378, whereby a tender of a sum due for principal and interest does not stop interest running unless the sum has been set aside and is ready for payment at any time. He pointed out that as no tender at all had been made in the present case, it was, in fact, stronger than those cases he had referred to.

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*Trespass—inevitable accident.*—*National Coal Board* v. *Evans & Co.*, [1951] 2 All E. R. 310, is an interesting case, though not dealing directly with property law. The plaintiff's predecessors in title had laid a cable across land belonging to a county council without their knowledge or consent. Contractors employed by the council then, when digging a trench, damaged the cable so that it subsequently exploded and the electricity supply to the plaintiff's property was cut off. Donovan, J., found on Assize on the facts that the defendants

were not guilty of negligence (they had, of course, no means of knowing that the cable existed), and the Court of Appeal (overruling Donovan, J.) held following *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261, that they were not liable for trespass as they were utterly without fault. Cohen, L.J., said, " Clearly, I should have thought that they " (the plaintiffs) " could not have succeeded in any action against the county council, since they were trespassers in placing their cable on the land, and I cannot see any reason why the defendants should be in a worse position than the county council ".

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## *CORRIGENDUM*

See p. 185, *ante*

*Re* 139 *High Street, Deptford,* [1951] 1 All E. R. 950. Paragraphs 4 and 5 of the note are misleading.

Wynn-Parry, J., after he had decided that the respondent had, under section 82 (3) (*a*) of the Land Registration Act, 1925, contributed to the mistake which had arisen, informed the Court that, as the respondent contended, section 82 (3) (*b*) had no application to the present case. A " void disposition," he thought, referred to a case where the deed in question was void, and that was not so here.

He also said that had he not decided to order rectification under section 82 (3) (*a*), he would not have done so under section 82 (3) (*c*). The applicants had not shown that they needed the property in question, and the respondent had spent money on it. It would not, therefore, be unjust not to rectify against the respondent, and the applicants in his view would have been properly protected by their right to claim an indemnity under section 83 (6) (*a*) of the Act.

The right to claim an indemnity under section 83 of the Act will presumably not be contested. *Re Chowood,* [1933] 1 Ch. 574, can be distinguished on the ground that there the claim was made in respect of an overriding interest under section 70 of the Act, to which the claimant's title was of course subject, his sole loss was to pay for something he did not get. In the present case, overriding interests are not in point, and also the respondent has suffered loss additional to merely losing the land in that he has spent money upon it.

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## 2. *CHARITIES*

By Harold Potter, LL.D., of Gray's Inn, Barrister-at-Law

*Educational charity—company with preference shares—Town and Country Planning Act.*—To the difference between what is a charity for tax purposes and for the law of public trusts there may possibly be added a third rubric, what is a charity for the purposes of the

Town and Country Planning Act, 1947. Two cases on not very dissimilar facts bring this point home to us and show the need for watching very carefully any "determination" by the Minister that property is "held for charitable purposes" under section 85 of the Act, with reference to exemption from development charge.

In *Girls' Public Day School Trust* v. *Minister of Town and Country Planning,* [1951] Ch. 400, a limited company, formed to promote girls' schools, had certain preference shares which could carry a dividend of 4 per cent. free of tax, and on which lesser dividends had from time to time been paid. In *Girls' Public Day School Trust* v. *Ereaut,* [1931] A. C. 12, it was held that a company could claim exemption as a "public school" notwithstanding the existence of certain preference shares. Lord Atkin (at p. 32) very sensibly pointed out that the purpose of the company was to provide public schools and not to make a profit, and there was no substantial difference in this respect between shares paying a dividend and debentures, as a means of raising money. However, Roxburgh, J., held (distinguishing *Ereaut's Case*) that, in the instant case, the land held by the company was not held solely for charitable purposes and so could not claim exemption from development charge. The learned Judge pointed out that Lord Atkin had been dealing only with the question of what was a "public school" and not with the further issue of charity, and he opined that he could not proceed by way of analogy, adding that he did not think that any company lawyer would ever be safe in carrying the analogy between share capital and debenture capital very far.

No doubt there is always danger in approaching any question from the angle of "predominant purpose", though, perhaps, common lawyers are rather more ready to do so than Equity lawyers (and the cases of statutory interpretation are sometimes matters for the common law Judges, whereas perpetuity and other cases where charities are material fall to the Chancery Judges). It is respectfully suggested that the modern trend, to rely on some subsidiary provision in the constitution of an organisation as a technical ground for its exclusion from the list of charities, is a matter which urgently requires the attention of the Committee now sitting to study the law of charity.

This need is illustrated by the second case for comment, the decision in which went the other way. In *The Abbey, Malvern Wells, Ltd.* v. *Minister of Local Government and Planning,* [1951] 2 All E. R. 154; 1 T. L. R. 1050; 1 P. & C. R. 467, a limited company had been formed which had shares capable of carrying dividend. By a trust deed, to which the company was a party, all the shares were transferred to trustees so that any "profits" made would be applied for the advancement of education. Danckwerts, J., held, distinguishing *Oxford Group* v. *I. R. C.,* [1949] 2 All E. R. 537 (*ante,* Vol. 13, p. 398) and *Girls' Public Day School Trust* v. *M. of T. & C. P.* (*supra*) that, since the trustees operated the company and were bound to use the premises and apply the profits for charitable purposes, the land was held upon charitable trusts within the meaning of the Town and Country Planning Act, 1947, s. 85. The learned Judge said (at p. 476), "While nominally the company is held under the memorandum and articles of association, in actual fact it is regulated by

the memorandum and articles plus the trust deed". The trust deed was mentioned in the articles of association and affected the composition of the governing body of the company. Danckwerts, J., distinguished the case of the *Girls' Public Day School Trust* (1951) (*supra*) by saying that there the limitation on dividends had been voluntary and self-imposed and went on to add "apparently there was nothing to prevent the shares in question from being acquired by anyone, so that some avaricious person might, if he had been so disposed, have acquired shares and exercised his right to carry on the school in question, and the company in question, as a profit-making concern".

With respect it is felt that the line is very fine and difficult to draw. Section 85 of the T. & C. P. Act, 1947, does not refer to the future use of the property but the *present use* of the property. Just as the shares in one company could be transferred to an avaricious person (who, presumably, would have to acquire a controlling interest) so it would probably not be much more difficult for the trustees to dispose of their interest in the company with corresponding modification of the articles (where the existing articles restricted transfers to others than trustees of the charity). It is respectfully suggested that the analogy between finding money by issuing preference shares and finding it by issuing debentures is not very much more far-fetched than the proposition that a company, not itself a trustee, is bound by a trust deed affecting its share capital, even where some aspects of the trust deed are reflected in the articles of association by incorporation. Articles of association are, after all, only regulations for the internal management which is, and is meant to be, subject to the control of the controlling shareholders. It is not difficult to accept the analogy between the action of controlling shareholders in the management of the company and similar action which they have seen fit to incorporate in the articles of association.

Two rules might be suggested to assist conveyancers to deal with this very fine distinction drawn by the Courts. First, any general powers should be limited by proviso to such powers when properly exercisable in pursuance of charitable purposes (this will not, of course, help, if the purpose is specifically non-charitable, *e.g.*, the promotion of legislation). In the second place, if money is provided for a charity, but it is not intended that the donor should lose the whole value of his capital, the advance should be made by way of loan, and not shares. This presents certain difficulties in connection with land, owing to the jurisdiction of the Charity Commissioners, but these difficulties are not usually insuperable.

It may be added that companies limited by guarantee are awkward substitutes for companies limited by shares in such cases. It is therefore to be hoped that the Commissioners may be less reluctant to exercise their powers of incorporation under the Charitable Trustees Incorporation Act, 1872. This type of corporation seems admirably suited to the needs of charitable trusts when the Commissioners can be persuaded to exercise their power.

(*Re French Hospital,* [1951] 1 Ch. 567, in which directors of a charitable corporation were forbidden to alter their by-laws so as to permit payments which would have been forbidden to trustees of a

charity, bears on the point of alteration of articles of association made by Professor Potter, though the French Hospital was a chartered company. Like the *Abbey Case* this decision suggests that the Court will be willing to lift the corporate curtain " for the sake of charity " as it does in the case of enemy nationality and domicile for tax purposes, and restrain use of the law of companies amounting to breach of trust.—A. K. R. K.)

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## 3. *WILL CASES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

*Will—formalities—acknowledgment.—Re Davies,* [1951] 1 All E. R. 920. This decision of Morris, J. (as he then was), at Gloucester Assizes is a useful reminder of the strict interpretation of s. 9 of the Wills Act, 1837. A testatrix marked her will and it was signed by the first witness, who had seen her make her mark. The second witness came in in time to see the first witness sign and signed after the testatrix had acknowledged her mark. The section requires the marking or acknowledgment to be made in the presence of both witnesses. The will was therefore invalid. A previous will was upheld as unrevoked, under the doctrine of dependent relative revocation.

(Theobald 28, 30.)

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*Will—incorporation of existing and future documents—severability.—Re Schintz' Will Trusts,* [1951] W. N. 293. A will directed shares of residue to be held on the trusts of a previous voluntary settlement, including any new deed executed under a power of reservation and declaration of new trusts reserved in the settlement. The incorporation of future deeds was ineffective, as it would reserve power for the testator to alter the contents of his will by an instrument not complying with the Wills Act, 1837. But Harman, J., held that he could sever the two parts of the incorporation and give effect to the terms of the existing settlement as if they had been embodied in the will. *Re Edwards' Will Trusts,* [1948] Ch. 440 (C. A.), was followed.

(Theobald 55–56.)

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*Will — construction — employment and service. — Re Bedford,* [1951] 1 All E. R. 1095. A testator made bequests to every member of his salaried staff with not less than a certain number of years' service. Danckwerts, J., held that the bequests were limited to persons paid periodically and not according to work done, that the service need not be continuous but could be aggregated from several

periods, but that periods of war-service, though in some cases periods of employment, could not be included as periods of service to the company. It is reasonable that no payment should be made in respect of such periods but the exclusion of the periods from the minimum qualifying period does seem, with respect, a hardship. It is difficult to see what greater service an employee can do his firm than to preserve the country in which the firm operates. It is, however, better not to be generous with other people's money, and the decision is no doubt technically correct.

(Theobald 215.)

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*Will—construction—" surviving ".—Outerbridge* v. *Hollis,* [1951] W. N. 318. This decision of the Judicial Committee of the Privy Council is useful on a point which is clear in principle but on which not very much reported authority exists. Where a parent gives one child a life interest and gives the remainder to the " surviving children " that means the children who survive the parent and the first child mentioned. They must survive the parent because the saving from lapse contained in s. 33 of the Wills Act, 1837, does not apply to class gifts. They must survive the first child named because that child's death is the date of distribution. The surviving children were held to take jointly, in the absence of any indication of severance. The interesting result was that the decision would have had to be the same in any case, under the *jus accrescendi.*

(Theobald 231, 234.)

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*Will — construction — " relations " — notional class of intestate successors—old law.—Re Gansloser's Will Trusts,* [1951] 2 All E. R. 231; 2 T. L. R. 10. The class of " relations " is notoriously so wide as to be uncertain. In order to save bequests from failing on this account, the Courts have taken the charitable liberty of giving this word a rather special meaning quite divorced from the presumed intentions of the testator, that is, the class of persons who would take as next-of-kin within the Statutes of Distribution or the A. E. A., 1925. Such persons take under the bequest, however, and not under the special terms as to life interests or exact amounts laid down in the statutes. One has then to discover which persons would have taken under the statutes had the testator died intestate, and divide the bequest among them. Only those who would have taken in the actual case benefit, not all those who might have taken had some other person not existed or survived. Some books imply that any member of the classes referred to in the statutes is entitled to share, whether he or she would have taken on intestacy in the actual circumstances or not, but this appears to be incorrect. The wife is also excluded from benefiting under the term " relations ". In the instant case there was an added complication in that one-half the testator's estate was left to his wife's " relations ". The testator died in 1929 and his wife in 1949, so that it was very material at what date these " relations " were ascertained, in view of births and deaths and the changes in the law

of intestate succession effective on January 1, 1926. Vaisey, J., decided that they were the persons who would have taken had the wife died intestate immediately after the testator, because " it is well settled that the Court inclines to an early date of vesting ". The learned Judge also considered that the testator was more likely to have meant to benefit people then in existence and possibly known to him, than other persons, possibly not then born. How far it is possible to consider the actual state of mind of a testator in such highly artificial circumstances may be doubted. Legal fictions are tigers from which it is difficult to dismount, and the artificial interpretation of " relations " seems to be a tiger which is getting out of hand.

The relations were to take as joint tenants. The initial direction to divide the residuary personalty into two halves could not be extended so as to be used to effect a further subdivision.

In the event it was possible to decide the case on English law. A problem of conflict of laws was involved. The testator was domiciled in Italy and the construction of his bequests of personalty was governed by the *lex domicilii*. Italian law, however, directed a " renvoi " to the law of his residence in the Straits Settlements, presumably as a special subdivision of his " national law " based on residence in British territory. The law of the Straits applied the same rules as in England.

Although this case was decided under the pre-1926 law its general principles remain the same today, with a substitution of the provisions on intestacy of the A. E. A., 1925, for those under the Statutes of Distribution (*Re Bridgen,* [1938] Ch. 205).

(Theobald 246, 247, 9.)

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*Will—construction—" family ".—Re Edwardes,* [1951] W. N. 263. In this case residue was left to the testatrix' " family ". She left no children. It was held that " family " was not a term of art, but was not so wide as to be uncertain. It had to be construed in the light of each will. One sister was expressly excluded from benefiting. It was therefore held that the testatrix meant to include the other brother and sisters.

(Theobald 246.)

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*Will—construction—residue—" things ".—Re Edwardes* (*supra*). A gift of " all remaining things " in the last bequest in a will was held to operate as a general residuary bequest.

(Theobald 171.)

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*Will—apportionment—capital and income—income accrued before death.—Re Winder,* [1951] W. N. 380. A testator owned stock which was sold before his death to the British Transport Commission in exchange for British Transport stock. Shortly before he died a

capital distribution of B. T. stock was made, described as a "special profits dividend". The stock was quoted "ex div." before the testator died but the stock was not received until after his death. The dividend in this form was held to be income of the testator but not of his estate, so that it must be treated as capital. The testator's right to this stock was an asset of the estate at his death. *Re Muirhead,* [1916] 2 Ch. 181, was followed.

(Theobald 378, 134.)

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*Will—executors—release.—Tiger* v. *Barclays Bank, Ltd.,* [1951] 2 All E. R. 262. A trustee is not entitled to a formal release from possible liability except where all the beneficiaries are of full age and absolutely entitled and join in the release. In this case the defendant executors compromised with the plaintiffs, two residuary legatees, renounced probate and the plaintiffs were granted administration with the will annexed. As a condition of handing over the documents relating to the estate, the bank demanded a formal release from the plaintiffs. It was held that they were not entitled to this. No implied undertaking by the plaintiffs to indemnify the defendants could be spelled out of the compromise arrangements. Had a release been ordered the plaintiffs would have taken the risk of any maladministration by the bank which might later come to light, and would have had no answer to the other beneficiaries. It was unsuccessfully argued that a new trust had been substituted for the old and all liability under the old trust had gone. It was held that the original trust went on, though modified by some of the terms of the compromise, and it is difficult to see how any other decision was possible, as the plaintiffs appear not to have been the only beneficiaries, though the interests of other beneficiaries are not defined in the report. The other beneficiaries are entitled to see the original trust kept alive in their favour. The attitude of the defendants is, no doubt, due to the sensitivity of bank trustees who feel particularly exposed to "money-making" actions by grasping beneficiaries.

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## 4. *PLANNING CASES*

By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law

*Pre-Act contravention—enforcement notice.*—The case of *Higham* v. *Havant U. D. C.* has now (see [1951] 2 All E. R. 178) been before the Court of Appeal. The Court contented itself with approving, unanimously, the decision and reasoning of the Divisional Court (1 P. & C. R. 281, noted *ante,* p. 121). Thus it may be taken as settled that the time-limit imposed by section 75 (1) of the Town and Country Planning Act, 1947, in respect of contraventions of "previous planning control" (*i.e.,* a limit of three years from the appointed day under the Act) was in substitution for and not additional to the time-limit imposed by section 23 (four years from the date of the contravention). It seems to follow from the Divisional Court's reasoning

that the same applies to the time-limit (five years from the end of the war period) imposed by the Building Restrictions (War Time Contraventions) Act, 1946. However, both these special limits have now expired, so that the point has lost its importance except in cases where enforcement notices have already been served (or determinations under the 1946 Act have been made or are pending). For the future, development contravening earlier planning Acts is safe from enforcement procedure.

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## 5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

*Rent Restrictions Acts—superior tenancy at rent less than two-thirds of rateable value—position of sub-tenant at termination of superior tenancy.*—The main interest of *Public Trustee* v. *Dierkin*, [1951] W. N. 290, which turned upon an interlocutory point, is that it foreshadows an appeal to the House of Lords on the point of substance decided in *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, [1950] 2 K. B. 228, namely, that a sub-tenant has no protection under the Rent Acts upon the termination of a superior tenancy where the rent payable under the superior tenancy is less than two-thirds of the rateable value. This point, which was discussed by the Leasehold Committee in their Final Report, is the subject of temporary statutory provisions in section 7 of the Leasehold Property (Temporary Provisions) Act, 1951.

(Rent Restrictions Guide, 3rd ed., pp. 5, 11, 106.)

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*Rent Restrictions Acts—statutory tenancy—agreement that tenant should pay rates with corresponding reduction of rent—no necessary inference that a contractual tenancy is created.*—The case of *Steel* v. *Cockcroft*, [1951] 2 All E. R. 175, makes it clear that an agreement by which the tenant is in future to pay the rates direct, a corresponding reduction being made in the rent, does not necessarily destroy a statutory tenancy and substitute for it a new contractual tenancy. This is a matter of considerable practical importance. There may, of course, be cases where it appears from all the circumstances that the parties intended to put an end to the statutory tenancy and to bring into existence a new contractual tenancy.

(Rent Restrictions Guide, 3rd ed., p. 55.)

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*Rent Restrictions Acts—proof of standard rent—prima facie evidence from letting after relevant date.*—The case of *Keane* v. *Clarke*, [1951] 2 All E. R. 187, follows *Veale* v. *Cabezas*, [1921] W. N. 311, and *Bolger* v. *Daly*, [1925] 2 Ir. R. 42, in deciding that if the only tenancy of which evidence is available was entered into

after the relevant date (September 1, 1939) this will suffice to establish the standard rent, even if there is no positive evidence that it was the first letting or as to the position on or before the relevant date.

(Rent Restrictions Guide, 3rd ed., pp. 46–48.)

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*Rent Restrictions Acts—effect of a letting of rooms with a "licence to use kitchen"—sharing—separate dwelling—declaration in agreement that tenancy was to be within the Rent Acts ineffective.*—As part of the terms of settlement of a possession action brought by the owner of a dwelling-house against the statutory tenant it was agreed that the tenant was to have a licence to use the kitchen at all reasonable times, and there was a declaration that the tenancy was to be within the Rent Acts. Notwithstanding this declaration, the majority of the Court of Appeal (Lloyd-Jacob, J., dissenting) held that the grant of a licence to use the kitchen, being equivalent to an arrangement for "sharing" the kitchen (*pace Baker* v. *Turner*), deprived the tenancy of the character of the tenancy of a separate dwelling-house and thus of the protection of the Rent Acts. The judgment of Lord Asquith is notable for a meticulous analysis of the concepts of "licence" and "sharing". The dissenting judgment of Lloyd-Jacob, J., gives expression to an understandable reluctance to arrive at a conclusion which was contrary to the parties' intentions, but it is not in law convincing. No issue under the Landlord and Tenant (Rent Control) Act, 1949, was raised in the case. *Rogers* v. *Hyde,* [1951] 2 All E. R. 79, C.A.

(Rent Restrictions Guide, 3rd ed., pp. 27–29.)

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*Rent Restrictions Acts — licence, not tenancy — position after limitation of a transmitted statutory tenancy.—Marcroft Wagons, Ltd.* v. *Smith,* [1951] 2 All E. R. 271, is worth noting as showing the present disinclination of the Court of Appeal to infer the creation of a new protected contractual tenancy where the facts are somewhat ambiguous but the equity is on the landlord's side. Here, after the death of a person who had enjoyed a transmitted statutory tenancy as a result of section 12 (1) (*g*) of the 1920 Act, a daughter was allowed to occupy the premises for six months, paying weekly sums equal to the rent. She had, however, been refused a rent book and informed that the premises would be required for an employee of the landlord's. When the landlord did eventually demand possession she claimed the protection of the Rent Acts. The county court judge made an order for possession, holding that she was a licensee, not a tenant, and the Court of Appeal upheld his decision. Evershed, M.R., expressed the view that it would be shocking if the result of an act of kindness by a landlord, in refraining from requiring possession immediately on the mother's death out of consideration for the daughter, were to be that the daughter could not be dislodged, whereas a harsher attitude would have created no difficulty. The Court would be reluctant to draw this inference. This is interesting, not so much because of anything special

about the actual decision, as because it illustrates the prevailing climate, so to speak, of judicial opinion, of which practitioners should be aware.

(Rent Restrictions Guide, 3rd ed., pp. 17–18.)

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*Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—furnished sub-tenancy of whole dwelling-house—notice to quit to sub-tenant—effect of sub-tenant's application to rent tribunal—effect of incorrect name of landlord in tenant's application to tribunal.*—The case of *Francis Jackson Developments, Ltd.* v. *Hall,* [1951] 2 All E. R. 74, decides two points of interest. (1) The doctrine of *Prout* v. *Hunter,* [1924] 2 K. B. 736, that a dwelling-house is taken out of the general provisions of the Rent Restrictions Acts if, at the time when proceedings are brought the tenant has granted a furnished sub-tenancy of the whole of the premises, only applies to contractual sub-letting. If at the material time the contractual sub-tenancy has come to an end but, by reason of an application by the sub-tenant to a rent tribunal under section 11 of the Landlord and Tenant (Rent Control) Act, 1949, the sub-tenant has the temporary security of tenure conferred by section 11 (2) (*a*), *Prout* v. *Hunter* does not apply. The wording of section 11 (2) (*a*)—"the notice to quit . . . shall not . . . have effect"—does not prolong the contractual sub-tenancy but gives a new statutory security of tenure. (2) The Landlord and Tenant (Rent Control) Regulations, 1949 (SI 1949, No. 1096) as amended by the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (SI 1950, No. 1763), are directory and not imperative. The 1949 Act does not require an application to a rent tribunal to be in any prescribed form, and, therefore, the mere failure to specify something which the Regulations require is not fatal to an application. It was, accordingly, immaterial that in an application the name of the sub-tenant's landlord had been wrongly given.

It may be noted that, although not discussed as an issue, the applicability of section 11 of the 1949 Act in cases where a notice to quit was served *before* a reference under the 1946 Act has been made is assumed by the Court. This is a point which has been the subject of some difference of opinion.

(Rent Restrictions Guide, 3rd ed., p. 14.)

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*Landlord and Tenant (Rent Control) Act, 1949—demand of premium by agent—scope of authority.*—*Navarro* v. *Moregrand, Ltd.,* [1951] W. N. 335, underlines the landlord's responsibility where a premium is wrongfully demanded by his agent. If the demand is made within the scope of the agent's actual or ostensible authority it is made in the course of his employment and he is liable. In this particular case the landlords were held liable where an agent, who had ostensible authority to conduct the full business of letting, demanded a premium in contravention of section 2 of the Landlord and Tenant

(Rent Control) Act, 1949. It would be otherwise where the agent has no ostensible authority to arrange lettings. For example, managing agents are not liable for the wrongful act of a mere rent collector employed by them, who demands a premium but whose authority is limited to rent collection: cf. *Barker* v. *Levinson,* [1951] 1 K. B. 342.

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*Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—jurisdiction of county court judge to decide whether determination of rent tribunal was valid.*—In *R.* v. *Judge Pugh, ex p. Graham,* [1951] 2 All E. R. 307, the county court judge had declined jurisdiction to deal with an application for the apportionment of the rent of a dwelling-house, on the ground that there was in existence a determination by a rent tribunal which was based on the assumption that the dwelling-house had been converted into two separate dwelling-houses which were first let after September 1, 1939. The Divisional Court granted an application for an order of *mandamus* directing the county court judge to hear the application for apportionment. He was wrong in declining jurisdiction. If the facts were that there was really one dwelling-house which had been let before September 1, 1939, the rent tribunal's determination was a complete nullity. The county court judge had to decide this issue. It was clear from *Briscoe* v. *Stephens* (1824), 2 Bing. 213, referred to in *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek,* [1951] 2 K. B. 1, that the issue as to the jurisdiction of an inferior Court or tribunal was one which had to be decided by a superior Court in proceedings in which that issue was raised.

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*Agricultural holding—notice to quit—section 24 (2) of Agricultural Holdings Act, 1948.*—The case of *Budge* v. *Hicks,* [1951] 2 All E. R. 245, is one of some importance for agricultural landlords and tenants. It decides that where a landlord serves a notice to quit under section 24 (2) of the Agricultural Holdings Act, 1948, he must make it clear to the tenant under what paragraph it is served. It is, however, important to understand that a notice to quit which is not effective for the purposes of section 24 (2) in excluding compensation or security of tenure may still be effective as a notice to quit. If, however, the tenant has served a counter-notice within the proper time limit, the notice to quit will then be a nullity. It is becoming evident that the legal machinery of section 24 (1) and (2) and the Agriculture (Control of Notices to Quit) Regulations, 1948 (SI 1948, No. 190) is somewhat defective. In spite of the wording of section 26 (1) (*a*), resort to arbitration in regard to paragraphs (*b*), (*d*) or (*e*) of section 24 (2) is apparently permissive, not mandatory. A tenant who feels confident that the landlord is wrong in claiming that one of the grounds specified in section 24 (2) exists may serve a counter-notice instead of resorting to arbitration and await an action for possession by the landlord in the county court. The Court will then decide the

issue. Denning, L.J., is more than justified in calling attention to the pitfalls in the whole procedure: see [1951] W. N. 303. Both Somervell and Birkett, L.JJ., suggest that the Regulations might with advantage be re-drafted.

(Jackson's Agricultural Holdings, 10th ed., pp. 136–140.)

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*Allotments—agricultural holdings—length of notice to quit.*—The decision in *Stevens* v. *Sedgman,* [1951] 2 All E. R. 33, makes it clear that an allotment (as distinct from an allotment garden) may be an agricultural holding, and thus subject to the code of the Agricultural Holdings Act, 1948. The tenant will then be entitled to twelve months' notice to quit, to security of tenure under section 24 of the 1948 Act, and to compensation for disturbance, in appropriate cases. In order to be an agricultural holding an allotment must be used for agriculture in a commercial sense—*i.e.,* by way of a trade or business. Thus it must be used, *e.g.,* for the production of vegetables for sale, not for family consumption. An allotment *garden* can *never* be an agricultural holding, not because of its limited extent (not exceeding forty poles) but because by definition it is used for production of vegetable or fruit crops which are to be consumed by the occupier or his family. An allotment, on the other hand, *may* be an agricultural holding, but it need not be. If it exceeds forty poles but is devoted to production for family consumption, it is neither an allotment garden nor an agricultural holding. These differences are important as they affect rights to compensation and to security of tenure and such things as length of notice to quit.

(Jackson's Agricultural Holdings, 10th ed., p. 402.)

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*Landlord and tenant—restrictive covenant in lease—business of butcher—sale of poultry and rabbits.*—The decision of Vaisey, J., in *Hartshorn* v. *Angliss,* [1951] W. N. 293, is of some interest to the draftsman. It decides that the sale of poultry and rabbits on a butcher's premises did not constitute a breach of a covenant restricting the carrying on of any trade or business "other than that of a butcher". In other words, the restriction was not to be confined to the sale of "butcher's meat" in the narrow and limited sense of the words.

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*Landlord and tenant—implied reservation of easement in favour of landlord—right to display advertisements on outer wall of demised premises.*—In *Re Webb,* [1951] 2 All E. R. 131, the Court of Appeal have reversed the decision of Danckwerts, J., commented upon in these notes for December, 1950 (p. 400 *q*), which upheld an implied easement in favour of a lessor to display advertisements on the outer wall of the demised premises, and to repair and maintain them. Danckwerts, J., had regarded the case as falling within the exceptions, rather vaguely defined in earlier cases, to the rule that a grantor cannot

claim any easement on land granted for the benefit of land retained unless it is expressly reserved, on the principle that a grantor may not derogate from his grant. The Court of Appeal agreed that there were exceptions to the rule, but this was not one of them. Well recognised exceptions are easements of necessity and mutual rights of support between adjacent buildings. These, however, do not exhaust the exceptions. Jenkins, L.J., stated in general terms the circumstances which must be present to constitute a valid exception—they must be such as to raise a necessary inference that the common intention of the parties was to confer the right in question on the grantor or such as to preclude the grantee from denying the right consistently with good faith. In the present case the lessor had not discharged the onus of proving that either of these conditions was present. Jenkins, L.J., expressed the view that *Simpson* v. *Weber* (1925), 133 L. T. 46, which had influenced Danckwerts, J., could not be regarded as good law in so far as it was based on the negative ground stated in the reports that " there was no evidence that it was not the intention of the parties that the creeper and the gate-post should stay ".

(Woodfall, 24th ed., p. 568.)

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## 6. *FAMILY LAW CASES*

By C. E. P. Davies, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

*Covenant under seal by husband to pay annuities for benefit of wife and children—consideration being undertaking by wife not to claim maintenance for herself or children—covenant entered into after proceedings for divorce instituted by wife—whether enforceable.*—*Bennett* v. *Bennett,* [1951] 1 All E. R. 1088, was an action in the King's Bench Division brought by a wife to enforce a covenant under seal by her husband to pay annuities for the benefit of the wife and her younger son in consideration of an undertaking by her to accept this provision in full satisfaction of all claims for maintenance on behalf of herself and her two children. The deed was executed some months after the wife had presented a petition for divorce against her husband which included a claim for maintenance for her younger son and for maintenance and a secured provision for herself. *Hyman* v. *Hyman,* [1929] A. C. 601 decided, that " the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction " (*per* Lord Hailsham, L.C., at p. 614). But the immediate issue in *Hyman* v. *Hyman* was whether such a covenant by a wife precluded her from subsequently claiming maintenance and it was not necessary for that decision to consider whether the covenant was illegal because contrary to public policy, or a mere nullity. In the present case if the wife's covenant was null the husband's promise

to pay the annuities, being under seal, might have been enforceable; but if the wife's covenant was illegal the husband's undertaking given in consideration of it would be void and unenforceable. Devlin, J., decided that the covenant came within the latter category.

The plaintiff argued that *Hyman* v. *Hyman* was distinguishable on the ground that there the wife's covenant had been entered into before proceedings for dissolution of the marriage had been commenced whereas in the present case a petition for divorce including a claim for maintenance had been presented; therefore the wife's covenant was merely a compromise of the petition and not illegal. With regard to that part of the wife's covenant which concerned maintenance of her younger child, it was contended that *Hyman* v. *Hyman* should be restricted to a promise made by a wife during coverture in respect of her own maintenance. The case was in fact decided upon the second of these arguments, Devlin, J., holding that it was clearly in the public interest that children as well as former wives should be provided for and therefore illegal to oust the jurisdiction of the Court in that respect. Accordingly the husband's covenant was unenforceable being based upon such illegal consideration, which was not severable from the wife's covenant in respect of her own maintenance.

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*Maintenance—Matrimonial Causes Act,* 1950, *s.* 23—*whether husband who has complied with terms of separation deed can be guilty of wilful neglect to provide reasonable maintenance—application of cases decided upon Summary Jurisdiction* (*Married Women*) *Act,* 1895, *s.* 4.—*Tulip* v. *Tulip,* [1951] 2 All E. R. 91, was an application by a wife under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (now the Matrimonial Causes Act, 1950, s. 23) for increased maintenance on the ground that her husband had wilfully neglected to provide reasonable maintenance for her notwithstanding that a deed of separation entered into between them many years previously was still in existence and had been in all respects complied with by the husband. The wife claimed that she was entitled to apply because since the date of the deed her financial circumstances had deteriorated and those of her husband had improved. Two practical points of some importance were decided. First it was held that, as the words of the new section were identical with those of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, the decisions of the Divisional Court upon the construction of that section ought to be followed in the interpretation of section 23 of the 1950 Act unless they were plainly wrong.

The second point was whether the husband could be considered guilty of wilful neglect to provide reasonable maintenance for his wife. Barnard, J., in the Court below ([1951] 1 All E. R. 563) had held that it was not sufficient for the wife to prove that her financial circumstances had deteriorated or that those of her husband had improved; she must also establish that her husband had been guilty of some matrimonial misconduct such as failure to comply with the terms of a separation deed. But the Court of Appeal (Harman, J., dissenting) overruled this decision and held that the wife was entitled

to have the situation reviewed in the light of conditions arising subsequently. The deed of separation, however, was not wholly irrelevant for the Court considered that its evidential value as showing that the husband by maintaining payments regularly had been providing reasonable maintenance for his wife was extremely high.

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*Divorce—marriage of Mohammedan husband and Christian wife in English Register Office—subsequent unilateral declaration of divorce by husband in Mohammedan form—whether marriage dissolved.—Maher* v. *Maher,* [1951] 2 All E. R. 37. A Cambridge undergraduate domiciled in Egypt and professing the Mohammedan religion married an English girl at the Cambridge Register Office in March, 1946. Shortly afterwards, having taken his degree, the husband returned alone to Egypt and there made a declaration recognised by Mohammedan law, and known as *Talaknama,* that he had divorced his legally married wife. She subsequently petitioned the English Court for dissolution of marriage on the ground of her husband's desertion and Barnard, J., held that the Egyptian "divorce" was ineffective to dissolve the marriage and granted the decree. The facts and the decision were identical with the *Hammersmith Marriage Case,* [1917] 1 K. B. 634, but it is interesting that whereas this exception to the principle that the validity of divorce is determined exclusively by the *lex domicilii* was in the *Hammersmith Case* justified upon two grounds—first that English law will not recognise a foreign divorce unless it has been effected by judicial process and second that the marriage was a Christian and not a Mohammedan marriage and so could not be dissolved by a Mohammedan method, in the present case the latter was the reason given for the decision. This is in accordance with the hope expressed by Professor G. C. Cheshire that "the decision in the *Hammersmith Marriage Case* will be allowed to rest only on the second ground assigned by the Court" (*Private International Law,* 3rd ed., p. 488) for it is doubtful whether the English Court would be justified in insisting upon a judicial form for dissolution if some other equally effective method was recognised by the *lex domicilii.*

(Latey 400, Tolstoy 18.)

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*Divorce—desertion—interruption of three-year period immediately preceding presentation of petition by detention of respondent under Lunacy Acts—whether desertion continues—burden of proof.*—The issue before the House of Lords in *Crowther* v. *Crowther,* [1951] 1 All E. R. 1131, was whether three years' desertion immediately preceding presentation of a petition for divorce on that ground was interrupted by a period when the respondent was detained in a Mental Hospital under the Lunacy and Mental Treatment Acts, 1890 to 1930, as a person of unsound mind. In *Williams* v. *Williams,* [1939] P. 365, the Court of Appeal had decided reluctantly that such detention was necessarily inconsistent with continuance of the *animus deserendi* essential for desertion throughout the whole period. But in the present case the House of Lords overruled *Williams* v. *Williams* and decided that in such circumstances it was open for the petitioner to

offer evidence that the intention to desert continued during the period when the respondent was detained. Upon the question of onus of proof Lord Oaksey differed from the other members of the House in considering that if the original desertion was proved the burden shifted to the respondent to show that he or she had the intention to resume cohabitation.

(Latey 110, Tolstoy 48.)

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*Divorce—collusion—agreement executed by one party but repudiated by the other.*—The collusion alleged in *T.* v. *B.*, [1951] 2 All E. R. 183, consisted of an agreement as to damages against the co-respondent executed by the respondent but repudiated by the petitioner. The husband petitioner, on becoming aware of his wife's adultery, made an agreement with her for disposal of the matrimonial property whereby she received less than would otherwise have been her share in consideration of the husband's forgoing any claim for damages against the co-respondent. The wife's share in accordance with the agreement was paid to her by the husband before proceedings for divorce were commenced in which the husband, contrary to the agreement, claimed damages. No succinct definition of collusion has ever been formulated, which results on the one hand in some obscurity of interpretation and on the other in considerable elasticity. In the present case it was contended for the husband that this agreement was not one whereby the petition was presented or prosecuted in collusion with the respondent as it had been repudiated by the petitioner before the proceedings commenced; the wife's argument on the other hand was that collusion comprised any agreement procuring the initiation and providing for the conduct of a suit which clearly included an agreement such as the one pleaded concerning the damages which the co-respondent ought to be required to pay notwithstanding that the petitioner had repudiated his part of it. Willmer, J., accepted this wider interpretation and also the further argument of counsel for the wife that the only way in which the husband could purge himself of the taint of this collusion was by restoring the *status quo* by paying back what he had received, albeit indirectly, in pursuance of the agreement.

(Latey 118, Tolstoy 66.)

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*Divorce—condonation by resumption of sexual intercourse.*—In several cases recently the question whether resumption of sexual intercourse constitutes condonation has been discussed and the judgment of Lord Merriman, P., in *Viney* v. *Viney*, [1951] 2 All E. R. 204, contributes to the correct appreciation of these earlier decisions. In the present case the husband and wife had been separated for several years and the wife's maintenance order had been discharged on account of her adultery. She then returned to her husband's home because she had nowhere else to go and they resumed sexual relations on several occasions with the object of effecting reconciliation which, however, failed and the husband turned his wife out of the house. Her summons against her husband for a maintenance order on the ground of his constructive desertion was dismissed by the magistrate,

who decided that there had been no resumption of cohabitation, but the wife's appeal against this decision was allowed by the Divisional Court which held that these circumstances constituted condonation. In reaching this decision *Henderson* v. *Henderson,* [1944] A. C. 49, was followed, where the House of Lords held that resumption of sexual intercourse between husband and wife constituted condonation of the wife's previous adultery unless she had induced it by fraudulent misstatement of fact, such as denial of her pregnancy, or even deliberate misrepresentation of her true state of mind. *Mummery* v. *Mummery,* [1942] P. 107, was distinguished on the ground that in that case only the wife desired reconciliation and the husband clearly had no wish or intention to resume cohabitation; *Bartram* v. *Bartram,* [1950] P. 1, was pointed out to have been a case in which no question of resumption of sexual intercourse had arisen for it decided no more than that desertion by a wife was not terminated merely because she had returned to live in the same house as her husband; and *Whitney* v. *Whitney,* [1951] P. 250 (see *The Conveyancer,* Vol. 15, p. 131. March-April, 1951), was considered to have been wrongly decided. The learned President also emphasised the element of intention in condonation by pointing out that a clearer inference of condonation might be drawn from resumption of sexual relations by an innocent husband with a guilty wife than from such resumption by an innocent wife with a guilty husband because there might be instances where an innocent wife had no means of breaking off relations immediately owing to the difficulties of her situation.

(Latey 126, Tolstoy 62.)

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*Divorce—variation of settlements under Matrimonial Causes Act,* 1950, *s.* 25—*Interpretation of "settlement".*—It has long been accepted that "settlement" for the purpose of the Judicature Act, 1925, s. 192 (now the Matrimonial Causes Act, 1950, s. 25), should be given a more liberal interpretation than is commonly accorded to the word in a purely conveyancing context. The new point raised in *Lort-Williams* v. *Lort-Williams,* [1951] 2 All E. R. 241, was whether a policy of assurance taken out during a marriage by trustees upon the life of the husband and expressed to be for the benefit of his "widow or children" in such shares as he should appoint was a settlement which could be varied under the Matrimonial Causes Act, 1950, s. 25, notwithstanding that the wife to benefit under it might be the wife of a future marriage. The Court of Appeal, upholding Wallington, J., held that it was. "The word 'settlement' in section 25 of the Matrimonial Causes Act, 1950 . . . includes any provision made by a husband for the future benefit of his wife if it proceeds on the footing of the then existing marriage. It does not cease to be a settlement on her because the provision is not absolute but only contingent, nor does it cease to be a settlement on her because it may in its terms also be applicable for the benefit of a wife by a subsequent marriage" (Denning, L.J., at p. 245).

(Latey 275, Tolstoy 137.)

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*Divorce—custody of child—child born before marriage but incapable of legitimation under Legitimacy Act,* 1926.—*Harrison* v.

*Harrison,* [1951] 2 All E. R. 346, was an application under the Matrimonial Causes Act, 1950, s. 26 (1), by a wife whose marriage had been dissolved, for an order for custody of her child born before the marriage at a time when the wife was married to someone else. Her second husband, against whom she had recently obtained a decree of divorce, was the father of the child, whose legitimation by the subsequent marriage of the parents, however, was prevented by the operation of the Legitimacy Act, 1926, s. 1 (2). In *M.* v. *M.,* [1946] P. 31, it had been decided that such an order could be made in respect of a child born before, and subsequently legitimated by, the marriage of the parents, even though no decree of legitimation had in fact been made, on the ground that parenthood and not legitimacy was the test for jurisdiction to make the order. But in the present case Barnard, J., declined to extend this reasoning to enable an order for custody to be made and dismissed the wife's application on the ground that the matrimonial causes legislation constituted a court with exclusive jurisdiction in matrimonial cases, and conferred jurisdiction in certain ancillary matters to enable the Court to make necessary adjustments as between the parties to a marriage in the light of dissolution, and was therefore clearly concerned only with marriage and did not have anything but the children of the marriage in mind. Other statutes, however, some of which were specified (at p. 348) dealing with children in a different context included illegitimate children.

(Latey 238, and Supplement; Tolstoy 150.)

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## 7. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A. T. C.) or *Taxation Reports* (T. R.).

### (a) Income Tax

*Drummond* v. *C. I. R.,* [1951] T. R. 97 (C. S.).

(1) *Statutory provisions*: Rules 1 and 2 of No. VII of Schedule A, Rule 4 of Schedule B, the Income Tax Act, 1918; sections 10 and 11, the Finance Act, 1941; section 28, the Finance Act, 1942.

(2) *Point*: The question of occupation raised by section 10 (2) of the Finance Act, 1941, is an issue of fact. On this basis the Court of Session refused to interfere with the Commissioners' finding that the appellant taxpayer who possessed the right of grazing cattle and sheep over certain lands under the terms of a six-monthly tenancy agreement "occupied" those lands for the purpose of husbandry.

*Donald* v. *Thomson,* 8 T. C. 272, considered.

(*Note*:—The assessment appealed against was made in respect of the year 1948–49; cp. section 31, the Finance Act, 1948.)

*Crole* v. *Lloyd*, [1951] T. R. 105 (Ch. D.).

(1) *Statutory provisions*: Case I, Schedule D, the Income Tax Act, 1918.

(2) *Point*: If an appellant wishes to challenge the Commissioners' conclusion, embodied in a statement of mixed fact and law, on the grounds that there was no evidence to support that conclusion, or that in reaching it the Commissioners had misdirected themselves, he must ensure that the Commissioners are asked to find the facts upon which such conclusion is based.

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*Rellim, Ltd.* v. *Vise*, [1951] T. R. 109 (C. A.).

(1) *Statutory provisions*: Section 33 and Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Another decision which illustrates that the Commissioners' determination upon issues of fact is final.

(3) *Facts and Decision*: The appellant company was incorporated in 1938 and by its memorandum had power both to hold land as investment and to deal in land with a view to profit. In the year 1939 the company acquired twelve houses, 13½ acres of land and three garages, and in 1944 a further 47 acres of farm land. During this period the properties were let at rents, and it was conceded by the Revenue that relief for management expenses pursuant to section 33 of the Income Tax Act, 1918, should be granted to the company as an investment company.

In the years immediately ensuing the following sales took place:—

July, 1945 - one house and 1 acre of land;
April, 1946 - 47 acres of farm land;
March, 1947 - 12 acres of land;
August, 1947 - one house.

(At the end of the period the company therefore retained ten houses, three garages and a ½ acre of land.)

Assessment for the years 1946–47, 1947–48 and 1948–49, was made on the company upon the basis that in respect of those years the company had been trading in land. The company maintained that these sales represented a realisation of investment and that the proceeds were not therefore taxable.

The Commissioners found that the company was a trading company, trading at a profit, and confirmed the assessments.

*Held* (dismissing the appeal and affirming the decision of Wynn-Parry, J.), the question was one of fact for the Commissioners' determination and that there was evidence before them to support their finding.

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*Davies* v. *The Shell Company of China, Ltd.*, [1951] T. R. 121 (C. A.).

The decision of Danckwerts, J., was unanimously affirmed by the Court of Appeal, who granted leave to appeal to the House of Lords.

(For report of proceedings in the Chancery Division, see *The Conveyancer*, Vol. 15, No. 1, at p. 65.)

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*Littman* v. *Barron*, [1951] W. N. 378; [1951] T. R. 141 (C. A.).

(1) *Statutory provisions*: Section 27 (1), the Finance Act, 1927; section 15 (1), the Finance Act, 1940.

(2) *Point*: The sum charged under section 15 (1), *supra*, is nonetheless a profit in the meaning of that term as used in the Taxing Acts, because the section prescribes a conventional means by which that profit is to be computed.

(3) *Facts and Decision*: The taxpayer, a dealer in property, held a number of leasehold properties which he sub-let.

The majority were let at excess rents and assessment on the excess was made pursuant to section 15 (1) of the Finance Act, 1940. As regards the remaining properties the taxpayer claimed to have suffered a loss in that two were let at a rent less than that paid by him, and in respect of three he received no rents.

The taxpayer claimed that as regards the loss on these five properties he was entitled to rely on section 27 (1) of the Finance Act, 1927, and by force of its provisions to set off the amount of the loss against the excess of rent assessed.

The section (section 27, *supra*) is expressed to apply (*vide* subsection (1), *ibid.*) where a person sustains a loss,

> "in any transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of Schedule D . . .".

*Held* (reversing the decision of Wynn-Parry, J.), Jenkins, L.J., diss.: that the subject of charge in section 15 (1), *supra*, namely the "excess" was a profit to which section 27 (1), *supra*, applied, and that in consequence the appeal succeeded.

(Leave to appeal to the House of Lords granted.)

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*Bernard & Shaw, Ltd.* v. *Shaw* (*Rubin Third Party*), [1951] 2 All E. R. 267 (K. B. D.).

(1) *Statutory provisions*: Section 1, the Income Tax (Employments) Act, 1943; sections 1 and 2, the Income Tax (Offices and Employments) Act, 1944; Regulation 52, the Income Tax (Employments) Regulations, 1950 (SI 1950, No. 453).

(2) *Point*: An employer who has failed to exercise his statutory right and duty to deduct income tax on payment of remuneration cannot thereafter recover the amount of such tax by action against the employee. *Denby* v. *Moore* (1817), 1 B. & Ald. 123, applied.

(3) *Facts and Decision*: The defendant was director of the plaintiff company from April, 1946, until April, 1947. During this period he received from the company the sum of £1,682, and in respect of this sum the Revenue claimed from the plaintiffs £709.

being income tax which, it was said, should have been deducted by the plaintiffs pursuant to the P.A.Y.E. Regulations.

The plaintiffs claimed from the defendant the sum of £709 as money lent, or as money received or alternatively as money paid to the defendant's use.

*Held*:—

(1) that the sum paid to the defendant was paid as salary and accordingly the claim for money lent failed;

(2) that as the plaintiffs had knowingly and voluntarily paid the remuneration in full there was no mistake of fact such as would enable the plaintiffs to recover in an action for money had and received;

(3) that the plaintiffs had not paid the tax claimed by the Revenue and accordingly the action for money paid did not lie.

His Lordship indicated *obiter*:—

(i) that had the plaintiffs paid the tax claimed an action for money paid might have lain;

(ii) that an employer who fails to deduct tax from remuneration in respect of one period is, under the regulations above quoted, entitled to deduct such tax from remuneration paid to the employee in a later period.

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*Asia Mill, Ltd.* v. *Ryan,* [1951] T. R. 181 (H. L.).

(1) *Statutory provisions*: Rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The proper valuation of stock-in-trade is an issue of fact for the Commissioners' determination.

In arriving at the figure of such valuation the Commissioners (and the Courts) will be guided by the principles of accountancy.

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(b) PROFITS TAX

*Standage Power Couplings, Ltd.* v. *C. I. R.*; *C. I. R.* v. *Homo Metals Radiant Boiler Co., Ltd.,* 30 A. T. C. 46 (Ch. D.).

(1) *Statutory provisions*: Sections 19 and 20 and paragraphs 1 and 2 of the Fourth Schedule to the Finance Act, 1937; section 33 (1) and (2), the Finance Act, 1947.

(2) *Point*: Losses carried forward to any chargeable accounting period must be set off against the profits of that period before the rules as to abatement contained in section 33, *supra,* are applied.

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(c) ESTATE DUTY

*Re Gibbs,* [1951] T. R. 113 (Ch. D.).

(1) *Statutory provisions*: Section 27, the Finance Act, 1949.

(2) *Point*: Neither payment of an annuity nor the ascertainment of the residue of a deceased's estate are "events" within the meaning of that term as used in subsection (2) of section 27, *supra*.

(3) *Facts and Decision*: The deceased died on December 1, 1946, and the provisions of his will (dated April 24, 1939) and codicil (dated May 17, 1940) were proved on February 22, 1948. Administration had not been completed (nor residue ascertained) at the date of the present proceedings. The testator bequeathed a number of annuities free of all duties and directed the appropriation of investments to meet these annuities; after such appropriation his residuary estate was no longer to be liable to provide for the annuities.

The residue of the testator's estate was bequeathed to the trustees upon trust for conversion and payment of debts, etc., and subject thereto upon trust (*inter alia*) to pay an annuity of £800 per annum to his nephew's widow. An appropriation to the respective annuities (other than the annual sum of £800 per annum), as provided by the will, was made on January 30, 1947.

The trustees maintained:—

(1) that as regards the annuities an "event" in terms of section 27 (2) of the Finance Act, 1949, occurred on December 1 in each year (*i.e.*, on the anniversary of the testator's death) upon which a new amount of annuity became payable, and that legacy duty in respect of payments subsequent to July 30, 1949, was accordingly remitted;

(2) that as regards the annual sum of £800 payable out of the income of residue, the event, *i.e.*, the ascertainment of residue, must necessarily take place after July 30, 1949, and that accordingly no legacy duty would be payable.

*Held*:—

(i) that the appropriation (to the annuities) having been made prior to July 30, 1949, the claim to exemption failed;

(ii) that upon a proper construction of section 27 (2) of the Finance Act, 1949, the events therein referred to did not include the ascertainment of residue.

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*Re Beit*, [1951] W. N. 325; [1951] T. R. 133 (Ch. D.).

(1) *Statutory provisions*: Sections 2 (1) (*b*) and 7 (7), the Finance Act, 1894.

(2) *Point*: This decision is limited by the special nature of the facts and appears to enunciate no principle of general application.

(3) *Facts and Decision*: By her will dated December 21, 1945, the deceased (who died in 1946) bequeathed some twenty-five annuities (including one to a Mrs. Carter) of such an annual amount as after deduction of income tax would leave in the annuitant's hands £52 10s. 0d. The executors were further directed by the will to appropriate an annuity fund sufficient to provide for the annuities, and, subject thereto, the fund was to be held upon the same trusts as were declared concerning the balance of the testatrix's estate.

After payment of debts and duties it was found that the estate was insufficient to constitute the annuity fund as directed and the

executors therefore arranged to provide these annuities by purchasing corresponding annuities from the testatrix's children and by appropriating to each annuitant as security a purchased annuity of the same amount as the annuity given by will.

It is important to note the effect of this "arrangement", cp. *per* Vaisey, J.:—

> "Each annuitant was thenceforth in effect to have his or her annuity secured not on the general estate of the testatrix, nor on any annuity fund, but on another and unsecured annuity . . . resting in contract only".

The annuitants, including Mrs. Carter, addressed letters in similar terms to the executors agreeing to the "arrangement" proposed.

On the death in 1947 of Mrs. Carter the Estate Duty Office claimed that duty then became payable:—

(i) under section 2 (1) (*b*) of the Finance Act, 1894, on the cesser of her annuity;

(ii) under section 43 of the Finance Act, 1940, on the basis that her life interest had been disposed of or determined.

*Held*:—

(1) As the annuity paid in pursuance of the "arrangement" was not secured on any fund or property there could be no charge under section 2 (1) (*b*), *supra*.

(2) In the premises no benefit of any kind accrued or arose on cesser of the annuity bequeathed by will, alternatively, if such a benefit arose it had no value; again therefore there could be no charge under section 2 (1) (*b*), *supra*.

(3) The annuity bequeathed by will had never been disposed of or determined, and in consequence the claim under section 43, *supra*, also failed.

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*Re Cunliffe Owen (Decd.)*; *Mountain* v. *Comber and Others*, [1951] 2 All E. R. 220; [1951] T. R. 155 (Ch. D.).

*Point*: A direction in an English will that "death duties" payable in respect of all pecuniary or specific legacies are to be discharged from residue of the testator's estate may include foreign duties, even in the absence of express words referring to such duties, if the surrounding circumstances are of a sufficiently compelling nature.

The fact (in this case) that the testator had widely spread foreign interests and had, among other activities, been concerned in obtaining advice as to how to minimise the incidence of death duties on these interests, was held not to be such a compelling circumstance.

*Re Norbury*, [1939] 1 Ch. 528, explained.

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*Re Brassey's Resettlement*, [1951] T. R. 173 (C. A.).

(1) *Statutory provisions*: Sections 2 (1) (*b*) and 7 (7) of the Finance Act, 1894.

(2) *Point*: The right to enforce a trust possessed by remaindermen is an "interest" within section 2 (1) (*b*) of the Finance Act, 1894.

(3) *Facts and Decision*: By deed of appointment and resettlement executed in 1935 the deceased (Captain Brassey) and his son (Hugo) appointed certain property upon trust (*inter alia*) as to the income,

(i) to apply the same in payment of the premiums due upon certain policies of assurance on Captain Brassey's life (which the trustees had purchased from him);

(ii) as to the remainder upon protective trusts for Hugo during his life.

Subject to these trusts the capital of the settled property was limited in favour of Hugo's issue, as he should appoint, and failing issue as he should appoint by will. In so far as the foregoing trusts should prove inapplicable the limitations of the original settlement (dated 1897) would be effective and under these limitations the trust property devolved as appointed by Captain Brassey's will or failing appointment upon Hugo's sisters as respective tenants in tail.

The premiums were duly paid until Captain Brassey's death in 1946. At this date it appeared that Hugo was unmarried and had no issue, further that he had not exercised the general power of appointment reserved to him.

The Estate Duty Office claimed duty on Captain Brassey's death under section 2 (1) (*b*), *supra*, and for this purpose maintained:—

(i) that upon the death the interest of the remaindermen, which consisted in requiring (at need) that the income of the trust fund should be applied in payment of the premiums, ceased, and,

(ii) that a benefit arose, namely, that the sum previously required to satisfy the premiums (*viz.*, £1,977 per annum) was no longer withdrawn for this purpose and became immediately available for the enjoyment of the person (*viz.*, Hugo) entitled under protective trusts to the income of the trust premises.

The claim to duty extended to that portion of the trust fund which was required by the income thereof to meet the payment of annual premiums on the policies of assurance.

*Held* (affirming the decision of Romer, J.):—

(i) that the right vested in the remaindermen by which they could require the trustees to apply the income of the settled funds in payment of the premiums was an interest possessed by the remaindermen within section 2 (1) (*b*), *supra*;

(ii) that on Captain Brassey's death that interest ceased;

(iii) that a benefit arose on the death and the extent of that benefit was the proportion of the trust funds required by its income to satisfy the payment of the annual premiums on the policies of assurance.

*Note*:—It appears that there were different persons interested in the settled funds before and after the death and on this basis the decision in *Att.-Gen.* v. *Lloyds Bank*, [1935] A. C. 382, was distinguished.

(Leave to appeal to the House of Lords granted.)

## THE LIBRARY

*Short Forms of Wills.* By HENRY BRIGHOUSE, Solicitor. Sixth edition. By EDWARD F. GEORGE, LL.B., Solicitor of the Supreme Court, etc., and JAMES H. GEORGE, LL.B., Solicitor of the Supreme Court, etc. London: Sweet & Maxwell, Ltd. 1951. xii & 106 pp. (15s.)

This is a very practical collection of will forms mainly designed for moderate sized estates, and the learned Editors in their preface say that they have borne in mind the incidence of taxation and the need for simplification of trust limitations combined with flexibility and breadth of powers in administration. So far as we have tested it this collection is admirably fitted to carry out the learned Editors' design and is accurate. Personally we think that more use should be made of limited powers of various descriptions dependent upon the circumstances of the parties concerned, but there is a shortage of suitable precedents owing to the uncertainties that surround any but the most straightforward forms of special power in connection not only with death duties but also in such matters as perpetuity. A general power is, of course, open to the objection that inevitably it attracts death duty. Some of the more limited forms of power, that are not the usual special powers, may escape and be effective to carry out the required intention. It is, perhaps, only right that a collection such as this should avoid doubts. We think it a most useful book.

H. P.

*Conveyancing Costs.* By J. L. R. ROBINSON. London: Solicitors' Law Stationery Society, Ltd. 1951. (7s. 6d.)

*Probate and Administration Costs.* By J. L. R. ROBINSON. London: Solicitors' Law Stationery Society, Ltd. 1951. (5s.)

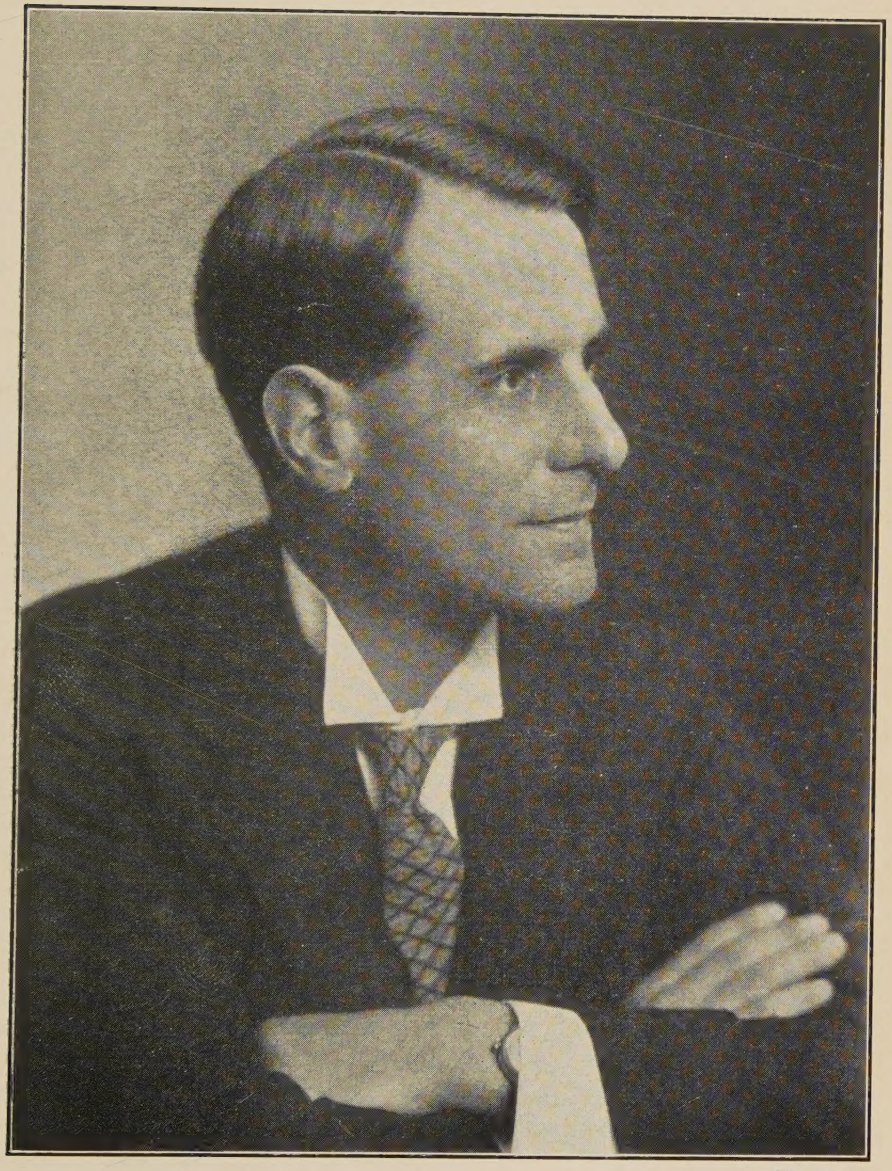
These are two new publications of the Oyez Practice Notes series. Each deals succinctly and clearly with the general law covering costs in the matter included within the scope of the book, gives the official scales, and then provides two or three specimen bills of costs. Obviously neither work is exhaustive, but clearly they are both based on sound practical experience and this is vital to that most repulsive branch of the law, costs drafting. We commend both these booklets to those concerned with these matters, but we find it difficult to understand why they are produced in paper covers. They are essentially "desk books" and require to stand up to hard wear.

H. P.

*Planning Appeals.* By HAROLD J. J. BROWN, LL.M., D.P.A., L.A.M.T.P.I., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. xv and 95 pp. (12s. 6d.)

This valuable little book is in two parts: the first, a brief exposition of the procedure governing appeals to the Minister from decisions of local planning authorities; and the second, a classified guide to the hundreds of recorded decisions upon such appeals. Both are admirable, as far as they go (though the author might have reprinted the official form of notice of appeal: not every practitioner has a copy). The author also endeavours, in Part II, to state the principles underlying the various decisions; but here he is too tentative to be of very much assistance. Perhaps the next edition will achieve greater coherence.

T. A. B. W.



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*Joint Editor of "The Conveyancer and Property Lawyer," 1936–1951*